

No. 11251

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CONSTANCE MAY GAVIN,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

FILED

MAY 4 1946

PAUL P. O'BRIEN,
CLERK

No. 11251

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

CONSTANCE MAY GAVIN,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

	Page
Amended Judgment for Plaintiff.....	41
Answer	12
Appeal:	
Notice of	42
Order Extending Time to Docket.....	43
Stipulation and Order re Original Exhibits.....	43
Certificate of Clerk.....	45
Complaint for Recovery of Income Taxes.....	2
Exhibit A. Claim Filed May 9, 1941.....	7
Exhibit B. Notice of Disallowance of Claim.....	11
Findings of Fact and Conclusions of Law.....	32
Judgment for Plaintiff.....	38
Judgment for Plaintiff, Amended.....	41
Memorandum of Points and Authorities in Opposition of Motion for Judgment on the Pleadings, Defend- ant's	19
Memorandum Opinion	29
Minute Order Entered May 8, 1945.....	15
Minute Order Entered May 14, 1945.....	15
Minute Order Entered June 14, 1945.....	15
Minute Order Entered July 2, 1945.....	23
Minute Order Entered July 5, 1945.....	23
Minute Order Entered July 31, 1945.....	24
Minute Order Entered August 2, 1945.....	29
Minute Order Entered August 20, 1945.....	32
Motion for Judgment on Pleadings.....	17

	Page
Names and Addresses of Attorneys.....	1
Notice of Appeal.....	42
Notice of Motion for Judgment on Pleadings.....	16
Order Extending Time to Docket Appeal.....	43
Plaintiff's Exhibits (See Index to Exhibits)	
Reasons and Points and Authorities in Support of Motion for Judgment on Pleadings, Plaintiff's.....	17
Reply to Defendant's Memorandum of Points and Authorities Opposing Motion for Judgment on Pleadings, Plaintiff's	21
Reporter's Transcript of Proceedings.....	47
Statement of Points to Be Relied Upon on Appeal, Appellant's (Circuit Court).....	162
Stipulation and Order re Original Exhibits.....	43
Stipulation for Amendment of the Judgment.....	39
Stipulation of Facts.....	24
Stipulation re Record on Appeal.....	45

INDEX TO EXHIBITS.

Plaintiff's Exhibits:

A. Supreme Court opinion, dated April 18, 1933 (In Evidence)	59
B. Agreement, dated February 28, 1934 (In Evidence)	86
C. Three papers designated Minute Order, dated February 28, 1934; Decision: Findings of Fact and Conclusions of Law; and Judgment (In Evidence)	95
D. Decree of Final Distribution (In Evidence).....	104
E. Certified copy of tax return with attached statements (In Evidence).....	159

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistants U. S. Attorney

EUGENE HARPOLE

Special Attorney, Bureau of Internal Revenue

600 U. S. Post Office and Court House Building

Los Angeles 12, Calif.

For Appellee:

LESLIE L. HEAP

453 South Spring Street

829 Citizens Bank Building

Los Angeles 13, Calif. [1*]

In the District Court of the United States

Southern District of California

Central Division

No. 4139-BH Civil

CONSTANCE MAY GAVIN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT FOR RECOVERY OF INDIVIDUAL
INCOME TAXES AND INTEREST THEREON

Plaintiff complains of the Defendant, and for cause of action alleges:

I.

That at all times hereinafter mentioned, the defendant was and now is a sovereign body politic; that the plaintiff, Constance May Gavin, was and now is a citizen of the United States and a resident of the City of Los Angeles, State of California within the Sixth Collection District of the State of California.

II.

That during the year of 1938, at the time of collections from plaintiff and disbursements to the defendant of the taxes of \$22,373.66, plus interest in the amount of \$4,997.88, totaling \$27,371.54 as hereinafter mentioned, Nat Rogan was the Collector of Internal Revenue in and for the Sixth Collection District of California, and main-

tained his office as such Collector in the City of Los Angeles, State of California; that said Nat Rogan is not in [2] office at the time of commencement of this suit, and is now deceased.

III.

That the jurisdiction of this Court is invoked under the provisions of Paragraph 20 of Section 24 of the Judicial Codes of the United States.

IV.

That no action upon the claim herein referred to, other than as herein set forth, has been taken before the Congress or any of the departments of the United States, or in any Court; that no assignment or transfer of said claim has been made; that plaintiff is entitled to the amount herein claimed from the defendant and there is no just credit or offset against said claim which is known to the plaintiff.

V.

That one James L. Flood died testate in San Mateo County, State of California, on or about February 15, 1926. That the last Will and Testament of said deceased was admitted to Probate in the Superior Court of the State of California in and for the County of San Mateo. That thereafter and on or about March 15, 1927, Constance May Gavin, the plaintiff herein, filed a petition for partial distribution in the said Estate of said James L. Flood, wherein she claimed a share in said estate as the illegitimate child and pretermitted heir of said James L. Flood; that in the trial of the said matter, the Judge or-

dered a directed verdict therein in favor of said Estate and against the plaintiff herein, even though the jury stood in favor of plaintiff. That the plaintiff appealed to the Supreme Court of the State of California from the said order directing a verdict against her as aforesaid and the appeal resulted in a reversal of the decision of said trial court. That before a retrial of the issues could be had, the parties thereto on or about February 28, 1934, entered into a compromise agreement whereby said plaintiff, Constance May Gavin, received a settlement in cash and securities [3] equal to two-thirds of her asserted claim; that the value of the cash and securities received by the plaintiff during the year 1934 as a result of the settlement was of the approximate value of \$206,974.43, more or less.

VI.

That on May 10, 1938, the plaintiff filed with the said Collector of Internal Revenue for the Sixth District of California her return of individual income taxes for the year 1934, on Form 1040; that included in said return was the sum of \$82,789.77 representing forty percent of the \$206,974.43 received by the plaintiff from the said Flood Estate; that said sum was included as taxable income on the theory that is represented a gain from a sale or exchange of a capital asset held for more than five years, and less than ten years.

VII.

That the said return filed for the year 1934, disclosed a tax liability of the sum of \$22,373.66, which amount the plaintiff duly paid to the said Collector, together with

interest in the amount of \$4,997.88, making a total of \$27,371.54. as follows:

September 3, 1938	\$ 3,000.00	
October 3, 1938	1,000.00	
November 3, 1938	1,000.00	
December 2, 1938	22,371.54	
	<hr/>	
Total		\$27,371.54

VIII.

That on May 9, 1941, plaintiff filed with the Collector of Internal Revenue for the Sixth District of California a claim for refund of said 1934 individual income taxes of \$22,373.66 and interest of \$4,997.88 paid by plaintiff to said Collector, plus interest thereon. Said claim for refund is founded on the provisions of Section 22 (b) (3) of the Internal Revenue Code, which provides that inheritances are excluded from taxable income, and that the inclusion as taxable [4] income for the year 1934, of the value, or any part thereof, of the cash and securities received by plaintiff from the Flood Estate, as a result of the compromise of her claim as an heir, was erroneous; a copy of said claim is attached hereto marked Exhibit "A" and hereby made a part hereof as though same were written at length herein.

IX.

That on or about August 12, 1941, the Collector of Internal Revenue, through his authorized agents, proposed to allow the claim for refund filed for the year 1934, in the amount of \$22,373.66 plus interest thereon. That

the plaintiff, through her attorney in fact, accepted said proposed allowance by executing Form 873 and forwarding same to the Internal Revenue Agent in Charge at Los Angeles, California.

X.

That subsequently, and on January 6, 1943, the Commissioner of Internal Revenue disallowed said claim for refund in full by sending a notice to that effect by registered mail to plaintiff. A copy of said notice is attached hereto marked Exhibit "B" and hereby made a part hereof as though same were written at length herein.

XI.

That said plaintiff has demanded of defendant the refund of said amount; that the defendant has not paid the same or refunded said sum, or any part thereof, or any portion of the interest to the said plaintiff, or any one else for plaintiff's benefit, use, or account.

XII.

That by reason of the facts hereinbefore alleged, plaintiff has overpaid her individual income taxes for the year 1934, as aforesaid, in the sum of \$27,371.54, and that the whole amount thereof, together with interest thereon, is now due and owing to [5] said plaintiff.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$27,371.54, together with interest thereon as provided by law and for such other and further relief as the Court may deem just and proper in the premises.

LESLIE L. HEAP

Attorney for Plaintiff [6]

[Verified.] [7]

Form 843

CLAIM

Collector's Stamp
(Date received)

May 9 1941

Coll. Int. Rev.

6th Dist. Cal.

☐ Refund of Tax Illegally Collected.

☐ Refund of Amount Paid for Stamps Unused, or
Used in Error or Excess.

☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

State of California)
) ss:

County of Los Angeles)

[Type or Print]

Name of taxpayer or Purchaser of

stamps Constance May Gavin (Mrs. John P. Gavin)

Business address

% Leslie L. Heap, Room 829, 453 South Spring Street
(Street) (City)

Los Angeles, California
(State)

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed 6th California
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1934, to December 31, 1934
3. Character of assessment or tax Individual Income Tax
4. Amount of assessment, \$22,373.66; dates of payment 1938
5. Date stamps were purchased from the Government X
6. Amount to be refunded \$22,373.66 plus interest or such greater amount as is legally refundable
7. Amount to be abated (not applicable to income or estate taxes) \$.....
8. The time within which this claim may be legally filed expires, under Section 322 (b) (1) of the Revenue Act of 1934, on May 10, 1941

The deponent verily believes that this claim should be allowed for the following reasons:

See statement attached hereto and made a part hereof.

(Attach letter-size sheets if space is not sufficient)

Signed CONSTANCE MAY GAVIN

Sworn to and subscribed before me this 6th day of May 1941

(Seal)

AUDREY THOMPSON

(Signature of officer administering oath)

Notary Public

(Title)

(See Instructions on Reverse Side) [8]

* * * * *

STATEMENT ATTACHED TO AND MADE A
PART OF CLAIM FOR REFUND OF
CONSTANCE MAY GAVIN

Constance May Gavin hereinafter referred to as the "Taxpayer", because of an erroneous belief on May 10, 1938 filed Form 1040, Individual Income Tax Return for the calendar year 1934. Said return indicated net income of \$83,907.88. Said return claimed a personal exemption of \$2,500.00. Subsequent to the filing of said return Taxpayer paid to the Collector of Internal Revenue the tax shown on said return in the amount of \$22,373.66 plus six per cent (6%) interest on said sum from March 15, 1935 to the date payment was made. Said return treated as income subject to capital gain \$82,789.77 account of property received from the estate of James L. Flood, deceased. Omitting said property from taxable income eliminates all liability for tax. Said property was transferred to Taxpayer in compromise of a lawsuit wherein Taxpayer contested said decedent's will.

Said will omitted mention of Taxpayer and Taxpayer claiming to be a pretermitted heir contested said will.

In compromise of said will contest the executor acting for said decedent's estate transferred to taxpayer property in kind from the estate in substantially the amount that would have been received had taxpayer been successful in contesting said will.

Thereafter Taxpayer was told by representatives of the Bureau of Internal Revenue that the receipt of said property from said estate was taxable as income and Taxpayer

thereupon took steps to file a proper return and pay the tax shown thereon.

However, Taxpayer now learns that the United States Supreme Court in the case of *Lyeth v. Hoey*, 305 U. S. 188, 59 S. Ct. 155, 21 A. F. T. R. 986, determined that property received as a result of a contest by parties claiming to be entitled thereto because of the laws of inheritance take by inheritance and not by purchase. Therefore, the Supreme Court exempts from income tax property received as a compromise to a contest over the heirship of an estate.

Thereafter following the precedence established by the Supreme Court the United States Board of Tax Appeals and the Federal Courts have held as non-taxable property received as a result of a compromise of a lawsuit in which the claimant contends a right to the property as an heir. The Bureau of Internal Revenue has acquiesced in cases analogous to Taxpayer's.

Wherefore, Taxpayer respectfully requests the amount paid to be the Collector of Internal Revenue be refunded with interest forthwith, and that it be determined taxpayer has no liability for income tax on account of said property received from said estate. [9]

EXHIBIT "B"

TREASURY DEPARTMENT

Washington

Jan 6, 1943

(Cut)

Office of

Commissioner of Internal Revenue

Address reply to Commissioner of

Internal Revenue and refer to

IT:C1:CC:Rej

Mrs. Constance May Gavin,

c/o Leslie L. Heap,

Room 829, 453 South Spring Street,

Los Angeles, California

In re: Claim for refund of \$22,373.66.

For the year 1934

In accordance with the provisions of section 3772 (a) (2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

Respectfully,

GUY T. HELVERING,

Commissioner

By

Deputy Commissioner.

994M (Rev.)

[Endorsed]: Filed Jan. 2, 1945. [10]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above entitled action and in answer to plaintiff's complaint admits, denies and alleges:

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Denies that the plaintiff is entitled to the amount claimed in this action, or any other amount; that as to the other matters alleged in paragraph IV of plaintiff's complaint defendant is without knowledge or information sufficient to form a belief as to the truth thereof.

V.

Denies each and every allegation contained in paragraph V thereof except that defendant admits that one James L. Flood died testate in San [11] Mateo County, State of California, on or about February 15, 1926. That the last Will and Testament of said deceased was admitted to Probate in the Superior Court of the State of California, in and for the County of San Mateo. That

thereafter and on or about March 15, 1927, Constance May Gavin, the plaintiff herein, filed a petition for partial distribution in the said Estate of said James L. Flood, wherein she claimed a share in said estate as the illegitimate child and pretermitted heir of said James L. Flood; that in the trial of said matter, the Judge directed a verdict against the plaintiff herein. That the plaintiff appealed to the Supreme Court of the State of California from the said order directing a verdict against her as aforesaid and the appeal resulted in a reversal of the decision of said trial court. That before a retrial of the issue could be had, a compromise agreement was entered into whereby said plaintiff, Constance May Gavin, received a settlement in cash and securities of the approximate value of \$206,974.43, more or less.

VI.

That as to the allegations contained in paragraph VI thereof, defendant is without knowledge or information sufficient to form a belief as to the truth thereof, except that defendant admits that on May 10, 1938, the plaintiff filed with the said Collector of Internal Revenue for the Sixth District of California her return of individual income taxes for the year 1934, on Form 1040; that included in said return was the sum of \$82,789.77 representing part of the \$206,974.43 received by the plaintiff under the settlement above referred to.

VII.

Admits the allegations contained in paragraph VII thereof.

VIII.

Denies each and every allegation contained in paragraph VIII thereof except that defendant admits that on or about May 9, 1941, plaintiff filed the claim for refund of which Exhibit "A" is a true and correct copy and plaintiff thereby filed with the Collector of Internal Revenue for the Sixth District of California, a claim for refund of said 1934 individual income taxes of \$22,373.66 and interest of \$4,997.88 paid by plaintiff to said Collector plus [12] interest thereon.

IX.

Denies each and every allegation contained in paragraph IX thereof.

X.

Admits the allegations contained in Paragraph X.

XI.

Admits the allegations contained in paragraph XI.

XII.

Denies each and every allegation contained in paragraph XII thereof.

Wherefore having fully answered plaintiff's complaint defendant prays it be dismissed hence with its costs in this behalf expended.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL and

GEORGE M. BRYANT

Assistant United States Attorneys

By George M. Bryant

Assistant United States Attorney

Attorneys for Defendant

[Minutes: Tuesday, May 8, 1945]

Present: The Honorable Ben Harrison, District Judge.

On the Court's own motion, and, it appearing that Answer of the defendant has been filed herein, it is ordered that the clerk place this case on the calendar of May 14, 1945, at 10 A. M., for setting for trial and that the clerk notify counsel to appear at that time. [14]

[Minutes: Monday, May 14, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for setting for trial; Leslie L. Heap, Esq., appearing as counsel for the plaintiff; Geo. M. Bryant, Assistant U. S. Attorney, appearing as counsel for the Government; and H. A. Dewing, Court Reporter, being present and reporting the proceedings:

It is ordered that the cause be, and it hereby is, set for trial June 18, 1945, at 11 A. M. [15]

[Minutes: Thursday, June 14, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming before the Court; Leslie L. Heap, Esq., appearing for the plaintiff, and Eugene Harpole, Esq., Special Attorney, Bureau of Internal Revenue, appearing for the defendant; by consent of said counsel appearing, it is hereby ordered that the order heretofore entered setting this cause for trial for June 18, 1945, at 11 A. M., is vacated and set aside, and this cause is now ordered continued to July 2, 1945, at 10 A. M. for setting for trial. [16]

[Title of District Court and Cause.]

NOTICE OF MOTION FOR JUDGMENT ON
PLEADINGS

To Defendant, United States of America, and to Charles H. Carr, United States Attorney, E. H. Mitchell and George M. Bryant, Assistant United States Attorneys, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, its Attorneys:

You and each of you will please take notice that on July 2, 1945, at 10 o'clock A. M., or as soon thereafter as counsel may be heard, in courtroom number Six of the above entitled Court, Plaintiff, by and through her counsel, will move the said court for a Judgment for Plaintiff on the pleadings in the above entitled action.

Said motion will be made upon the ground that the answer of said Defendant on file herein does not state facts sufficient to constitute a defense to the cause of action set forth in Plaintiff's complaint herein.

Said motion will be made and based upon this notice of motion, [17] the written motion served and filed herewith, the pleadings herein and the Plaintiff's statement of reasons and points and authorities in support of said motion which are served and filed herewith.

Dated: June 21, 1945.

LESLIE L. HEAP

Attorney for Plaintiff

[Endorsed]: Filed Jun. 21, 1945. [18]

[Title of District Court and Cause.]

MOTION FOR JUDGMENT ON PLEADINGS

Now comes the Plaintiff in the above entitled action, by and through Leslie L. Heap, her counsel, and moves the above entitled court that Judgment be given and entered in this action for the Plaintiff on the pleadings in this cause.

In support of this motion Plaintiff alleges that it is made upon the ground that the answer of the Defendant herein does not state facts sufficient to constitute a defense to the cause of action set forth in Plaintiff's complaint herein.

This motion is made and based upon the pleadings in said cause, this motion, the notice of motion served and filed herewith, the statement of reasons and points and authorities served and filed herewith.

Dated: June 21st, 1945.

LESLIE L. HEAP

Attorney for Plaintiff

[Endorsed]: Filed Jun. 21, 1945. [19]

[Title of District Court and Cause.]

PLAINTIFF'S REASONS AND POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON PLEADINGS

I.

In addition to Jurisdictional facts the complaint alleges in substance, and the answer admits:

1. That Plaintiff claimed to be the daughter and pre-termitted heir of the decedent referred to in the complaint;

2. That she filed a petition for partial distribution in the Estate of said decedent claiming a share of said Estate as the child and pretermitted heir of said decedent.

3. That after a directed verdict in the first trial was reversed by the Supreme Court and before a retrial, said claim was compromised and settled.

4. That in said compromise and settlement, Plaintiff received in cash and securities of the approximate value of \$206,974.43.

5. That a return on form 1040 was filed and \$82,789.77 (40% of \$206,974.43) was taxed as income and the tax amounting to [20] \$22,373.66 and interest of \$4,997.88 or a total of \$27,371.54 was paid as alleged in paragraph VII of the complaint.

6. That a claim for the refund of said taxes was filed May 9, 1941.

7. That on January 6th, 1943, the Commissioner of Internal Revenue disallowed and denied said claim.

8. That Plaintiff has demanded the refund of said taxes together with interest thereon and the Defendant has refused to refund any part thereof.

As shown by the foregoing, Defendant's answer presents no material issue of fact, but only an issue of law to be determined by the Court. The Plaintiff has accordingly moved for a judgment on the pleadings.

It is Plaintiff's contention that such motion is proper and should be granted because the amounts received by Plaintiff in said settlement was not income within the meaning of the 16th Amendment to the United States Constitution, nor income in any sense; and furthermore, if it were, it should be excluded because it was an inheritance or at least in the nature of an inheritance. [21]

II.

* * * * *

* * * Inasmuch as the facts hereinabove stated show on the face of the Pleadings herein, Plaintiff is entitled to judgment on her Motion for Judgment on the Pleadings.

Respectfully submitted,

LESLIE L. HEAP

Attorney for Plaintiff

[Endorsed]: Filed Jun. 21, 1945. [25]

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM OF POINTS
AND AUTHORITIES IN OPPOSITION OF
MOTION FOR JUDGMENT ON THE PLEAD-
INGS [26]

* * * * *

The defendant has admitted the allegations of Paragraphs I, II, III, VII, X and XI of the Complaint. Paragraph IV of the Answer denies that plaintiff is entitled to the amount claimed in the action, or any other amount. Paragraph V of the Answer admits the allegations contained in the complaint that James L. Flood died testate in San Mateo County, State of California, on or about February 15, 1926; that the last will and testament of said deceased was admitted to probate in the Superior Court of the State of California in and for the County of San Mateo. That thereafter, and on or about March 15, 1927, Constance May Gavin, the plaintiff herein, filed a petition for partial distribution in the said estate of the said James L. Flood, wherein she claimed to share in said estate as the illegitimate child and pretermitted

heir of said James L. Flood; that in the trial of said matter the Judge directed a verdict against the plaintiff herein as aforesaid, and the appeal resulted in a reversal of the decision of said trial court. That before a retrial of the issue could be had, a compromise agreement was entered into whereby said plaintiff, Constance May Gavin, received a settlement in cash and securities of the approximate value of \$206,974.43 more or less; all other allegations of paragraph V of the Complaint are denied in the Answer. The Answer admits the filing of plaintiff's income tax return for the year 1934, and a claim for the refund of tax reported and paid for that year. The Answer admits that the Commissioner of Internal Revenue rejected the plaintiff's claim for refund of the plaintiff's 1934 income taxes. The Answer denies that plaintiff received any sum as an heir of James L. Flood, deceased. [27]

* * * * *

CONCLUSION

It is submitted that the plaintiff's Motion for Judgment on the Pleadings should be denied.

CHARLES H. CARR EH

United States Attorney

E. H. MITCHELL EH

Asst. United States Attorney

GEORGE M. BRYANT EH

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

Attorneys for Defendant, United States
of America

[Endorsed]: Filed Jun. 27, 1945. [37]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY TO DEFENDANT'S MEMO-
RANDUM OF POINTS AND AUTHORITIES
OPPOSING MOTION FOR JUDGMENT ON
PLEADINGS

I.

Statement Re Facts Shown By Pleadings:

We again repeat that the complaint alleges and the answer admits the facts enumerated 1 to 8 inclusive on page 1 and 2 of Plaintiff's Reasons and Points and Authorities in support of her motion for Judgment on the pleadings.

Counsel for the defense very adroitly avoids referring to those alleged and admitted facts, but it is to be noticed that none of those facts are denied in Defendant's Points and Authorities. Furthermore, we believe that some of the statements of counsel for the defense in their points and authorities in opposition to the motion are misleading and confusing. For instance, in four different places in Defendant's said points and authorities, (L. 24 & 25, p. 2; L. 10 & 11, p. 5; L. 30-32, p. 5; L. 14 & 15, p. 11), it is said that the answer denies that Plaintiff received the money and property taxed herein from the Flood Estate. The fact is that the answer in [38] referring to Plaintiff's suit against the Estate (L. 14 to 18, p. 2 of Answer) states:

"That before a retrial of the issue could be had, a compromise agreement was entered into whereby said plaintiff, Constance May Gavin, received a settlement in cash and securities of the approximate value of \$206,974.43 more or less."

That is the fact we set forth as number 3 in our above mentioned statement of alleged and admitted facts. The fact is that Plaintiff's suit against said estate was compromised and settled and the tax involved herein was assessed against the money and property she received in said settlement. It is our contention that it was not income and that the tax was therefore erroneous.

In our opinion the Defendant is begging the question. It is quite evident from the Defense Points and Authorities opposing the motion that the Defendant fully realizes that the sole issue involved herein is one of law, not fact, to-wit: whether under the said 8 enumerated alleged and admitted facts, Plaintiff is entitled to Judgment? We contend that under those facts shown by the pleadings this motion should be granted. [39]

* * * * *

Therefore, Plaintiff submits that under the facts alleged and admitted by pleadings, as enumerated in our opening points and authorities in support of this motion, a clear issue of law is presented and under the cases heretofore cited, the Plaintiff's motion for Judgment on the pleadings should be granted.

Respectfully submitted,

LESLIE L. HEAP

Attorney for Plaintiff

[Endorsed]: Filed Jun. 29, 1945. [50]

[Minutes: Monday, July 2, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for hearing on motion of plaintiff for judgment on the pleadings, pursuant to notice, motion and points and authorities in support thereof, filed June 21, 1945; and for setting for trial; Leslie L. Heap, Esq., appearing for the plaintiff; Eugene Harpole, Esq., Special Attorney, Bureau of Internal Revenue, appearing for the Government: Counsel for plaintiff makes a statement to the Court. Attorney Harpole makes a statement. The Court makes a statement and orders said motion and setting continued to July 5, 1945, at 10 A. M. and that this cause is set for pre-trial hearing at the same time. [51]

[Minutes: Thursday, July 5, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for (1) pre-trial hearing; (2) motion of plaintiff for judgment on the pleadings, pursuant to notice, motion, and points and authorities, in support thereof, filed June 21, 1945; and (3) setting for trial; Leslie L. Heap, Esq., appearing as counsel for the plaintiff; Eugene Harpole, Special Attorney, Bureau of Internal Revenue, appearing as counsel for the Government; the Court and counsel for the parties hereto have a discussion as to the issues herein, and as to the contentions of the parties hereto. The Court makes a statement and suggests a stipulation of facts by the parties, and orders that this cause be set down for trial on July 31, 1945, at 10 A. M. No ruling is made by the Court on the said motion of the plaintiff for judgment on the pleadings at this time. [52]

[Minutes: Tuesday, July 31, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause coming on for hearing on (1) motion of plaintiff for judgment on the pleadings, and for trial; Leslie L. Heap, Esq., appearing for the plaintiff; Geo. M. Bryant, Assistant U. S. Attorney, and Eugene Harpole, Special Attorney, Bureau of Internal Revenue, appearing for the defendant; both sides answer ready.

Attorney Heap makes a state re written stipulation of facts and the nature of the evidence to be presented, and the Court reads the stipulation of facts and orders same filed herein. On Motion of Attorney Heap, Plaintiff's exhibits to the stipulation of facts, to-wit: Plaintiff's Exhibits A, B, C, D and E are offered and admitted.

Both sides rest.

Respective counsel present and the Court have a discussion. The Court makes a statement and orders said motion of plaintiff for judgment on the pleadings denied. and orders this case stand submitted for decision upon the pleadings and the evidence presented by the stipulation of facts and the said exhibits. [53]

[Title of District Court and Cause.]

STIPULATION OF FACTS

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendant, that the following facts are true and, subject to the right of either party to object on the ground of their relevancy or materiality, may be offered in evidence at the trial of the above entitled action, and that either party may introduce evidence of other material or relevant facts.

I.

James L. Flood died testate in San Mateo County, State of California, on or about February 15, 1926. His last Will and Testament was admitted to Probate by the Superior Court of the State of California in and for said County on March 11, 1926 and James E. Walsh and Maud Lee Flood, named in said Will as Executors were appointed Executors thereof on or about said last mentioned date and Letters Testamentary were issued accordingly. That said two last named persons were then and continued to be the duly qualified, appointed and acting Executors in said matter until the death of said [54] James E. Walsh on April 15, 1932. Thereafter and during all times hereinafter mentioned said Maud Lee Flood was and continued to be the duly qualified, appointed and acting sole Executor in said matter.

II.

That said Maud Lee Flood was the widow of said decedent and James Flood and Mary Emma Flood both hereinafter mentioned were his son and daughter respectively. That Cora Jane Flood was a sister of said decedent James L. Flood. She died November 1, 1928 during the administration of said estate.

III.

On August 12, 1931, said James E. Walsh and Maud Lee Flood as trustees, sold 4,295 shares of the Flood Realty Company stock to the Flood Realty Company, and at the time of distribution of the estate said Maud Lee Flood consented to the distribution of said 4,295 shares to said company.

IV.

On March 13, 1927, Constance May Gavin filed in the Court probating the said estate, a petition for partial

distribution, claiming that she was entitled to 2/9ths of said estate as the daughter and pretermitted heir of said decedent and asking for distribution of a portion of said estate to her. A trial of the matters set forth in said petition was had before a jury and the trial court directed a verdict against the petitioner in August, 1931 and a judgment thereon was entered against her. An appeal was taken from said judgment and on the 18th day of April, 1933, the Supreme Court of the State of California (in Bank) by written opinion, reversed the decision against the petitioner and remanded the cause for a new trial. That said decision is reported in 217 Cal. 763 and a copy of said decision marked Exhibit "A" is to be admitted in evidence. A remittitur was filed May 20, 1933.

V.

Between May 20th, 1933 and February 28th, 1934, a compromise [55] settlement was arranged under which the following things were to and did occur:

1. Said litigation was to be settled and terminated and it was settled and terminated on February 28, 1934, in the manner hereinafter set forth.

2. Plaintiff was to receive 2/3 of the amount sought in her petition for final distribution or 4/27 of the Estate of James L. Flood that became available for distribution and plaintiff or her assigns have in fact received that portion of said estate.

3. Plaintiff was to sign a certain document designated as an Agreement dated February 28, 1934 and deliver it to the representatives of said estate. She did sign said document and deliver the same to the representatives of the Estate of said James L. Flood, deceased, on the 28th

day of February, 1934. A copy of said document marked Exhibit "B" is to be admitted in evidence.

4. Petitioner was to permit and on the said 28th day of February, 1934, did permit her petition for partial distribution to come on for hearing without a contest, whereupon Findings of Fact, Conclusions of Law and a Judgment disposing of said petition were made and entered on the 28th day of February, 1934, and have become final. A copy of the Minutes of said proceedings and copies of said Findings of Fact, Conclusions of Law and Judgment, marked "Exhibit C" are to be admitted in evidence. She consented to the use of the document referred to in item 3 above for the purpose of supporting said Findings of Fact, Conclusions of Law and Judgment.

5. A Decree for the Final Distribution of the Estate of said James L. Flood, was to be and in fact was made and entered by the Probate Court on February 28, 1934. A copy of said Decree of Final Distribution, marked "Exhibit D" is to be admitted in evidence. Said Decree of Final Distribution has become final [56] and the distributions therein provided have been made to plaintiff and her assignees, Eugene Aureguy, John J. Taaffe, Tressie G. Taaffe, Maxwell McNutt, Albert Mansfield and Carmelita Aureguy.

VI.

The plaintiff in an effort to comply with the demands of the Revenue Department, filed an Income Tax Return on or about May 10, 1938, which said return covered the year of 1934. A copy of said return, with its attached statements, is to be marked "Exhibit E" and admitted in evidence.

VII.

The petitioner paid to the Collector of Internal Revenue the alleged income taxes and interest in the amounts and on the dates set forth in Paragraph VII of the complaint herein.

VIII.

On May 9, 1941, Plaintiff filed a claim for refund as set forth in her complaint and Exhibit "A" attached to the complaint herein is a true copy of said claim for refund.

IX.

That thereafter and on January 6, 1943, as set forth in the complaint herein, the Commissioner of Internal Revenue disallowed said claim for refund in full by sending a notice to that effect by registered mail to plaintiff. Exhibit "B" attached to the complaint is a true copy of that notice. Thereafter this suit followed.

LESLIE L. HEAP

Attorney for Plaintiff

CHARLES H. CARR—E.H.

U. S. Attorney

E. H. MITCHELL—E.H.

GEORGE M. BRYANT—E.H.

Assistant U. S. Attorneys

EUGENE HARPOLE

Special Attorney

Attorneys for Defendant

[Minutes: Thursday, August 2, 1945]

Present: The Honorable Ben Harrison, District Judge.

This cause having been heretofore tried by the Court and ordered submitted, and the Court having duly considered the pleadings, evidence, and the law applicable, and being fully advised in the premises, now hands down and orders filed its Memorandum Opinion, and in accordance therewith, orders judgment in favor of the plaintiff. The plaintiff is directed to prepare and present for signature proposed Findings of Fact and Conclusions of Law and Judgment. Filed Memorandum Opinion. [58]

[Title of District Court and Cause.]

MEMORANDUM OPINION

This case is the outgrowth of the decision of the Supreme Court of the State of California in the Estate of Flood, 21 P. (2d) 579. Before the retrial of the above case the parties entered into a compromise and as a result the plaintiff herein received approximately two-thirds of what she would have received had she prevailed on a retrial.

The government contends that inasmuch as her heirship was not established and entered into an agreement as part of her compromise, that she was not in fact an heir and, therefore, the amount received as a result of such compromise should be treated as income and should be taxable as such.

I am of the opinion that the plaintiff is entitled to recover under the authorities of *Lyeth v. Hoey* etc., 305 U. S. 188; *Magruder v. Segebade*, 94 F. (2d) 177, and *Keller v. Commissioner* etc., 41 B. T. A. 478.

As stated in *Lyeth v. Hoey*, 305 U. S. 188, on page 194:

“In exempting from the income tax the value of property acquired by ‘Bequest, devise, or inheritance,’ Congress used comprehensive terms embracing all acquisitions in the devolution of a decedent’s estate.”

And again on page 196 used the following language:

“* * * We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption. It does so, because it disregards the heirship which underlay the compromise, the status [59] which commanded that agreement and was recognized by it.”

See *Helvering v. Safe Deposit Company*, 316 U. S. 56.

If we disregard form for substance, it would appear to me that the money the plaintiff received under the decree of distribution in the Flood Estate was an acquisition in the devolution of said estate.

I look upon the wording of the agreement and consent decree that she was not an heir, a mere formality prepared and mapped out by legal talent in order to carry out the settlement of the then pending litigation. To me the real question of law to be determined is whether money or property received by one in settlement of his or her

claim to participate in the distribution of an estate is to be treated as income.

The law favors compromises (15 C. J. S. p. 738, Sec. 23, 26 C. J. S. p. 1111) and I see no reason why a rule of law should be established that would preclude compromises such as we find in this case. Under present rates of taxation such compromises would virtually cease.

We must remember that the government has lost nothing by reason of this compromise. If plaintiff had pursued her claim to a successful conclusion no tax would be due. On the other hand, if she had failed, no tax would follow.

I see no reason why this court should go back of the compromise and try the issue of heirship in order to satisfy the government that the claim of heirship was bona fide. Every compromise results in a loss to someone. If, in this court she should be able to establish her heirship, then the other heirs received more than their distributive share and such excess, under the government's theory, would be taxable as income. Are the District Courts to be called upon to determine who won or lost by reason of compromise between private parties?

I feel that the compromise agreement and the subsequent distribution pursuant thereto should be binding upon this court and not subject to review. [60]

Plaintiff is directed to submit proposed findings and judgment in accordance with this memorandum opinion.

Dated: This 2 day of August, 1945.

BEN HARRISON

Judge

[Endorsed]: Filed Aug. 2, 1945. [61]

[Minutes: Monday, August 20, 1945]

Present: The Honorable Ben Harrison, District Judge.

Findings of Fact and Conclusions of Law are now signed and it is ordered that they be filed. Judgment is signed and it is ordered that the said judgment be filed and entered. See C. O. B. [62]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on regularly for trial on July 31, 1945, and having been tried before the above entitled court, the Honorable Ben Harrison presiding, without a jury (a jury having been waived by the parties), Leslie L. Heap, Esq., appearing for the plaintiff, and Eugene Harpole, Esq., Special Attorney, Bureau of Internal Revenue, and George M. Bryant, Esq., Assistant United States Attorney, appearing for the defendant; evidence having been introduced and said cause having been argued and submitted for decision and the court being fully advised in the premises, makes the following findings of fact:

FINDINGS OF FACT

I.

That at all times hereinafter mentioned, the defendant was and now is a sovereign body politic; that the plaintiff, Constance May Gavin, was and now is a citizen of the United States and a resident of the City of Los Angeles, State of California within [63] the Sixth Collection District of the State of California, and subject to the jurisdiction of this Court.

II.

That during the year of 1938, at the time of collections from plaintiff and disbursements to the defendant of the taxes of \$22,373.66, plus interest in the amount of \$4,997.88, totaling \$27,371.54 as hereinafter mentioned, Nat Rogan was the Collector of Internal Revenue in and for the Sixth Collection District of California, and maintained his office as such Collector in the City of Los Angeles, State of California; that said Nat Rogan was deceased and was not in office at the time of the commencement of this suit.

III.

That the jurisdiction of this Court is invoked under the provisions of Paragraph 20 of Section 24 of the Judicial Codes of the United States.

IV.

That one James L. Flood died testate in San Mateo County, State of California, on or about February 15, 1926 and his last Will and Testament was admitted to Probate by the Superior Court of the State of California in and for said County on March 11, 1926 and James E. Walsh and Maud Lee Flood, named in said Will as Executors, were appointed Executors thereof on or about said last mentioned date and letters Testamentary were issued accordingly. That said named Executors were then and continued to be the duly qualified, appointed and acting Executors in said matter until the death of said James E. Walsh on April 15, 1932, and thereafter and during all times hereinafter mentioned, said Maud Lee Flood was and continued to be the duly qualified, appointed and acting sole Executor in said matter.

V.

That on March 13, 1927, Constance May Gavin, the plaintiff herein, filed in the Court probating the said

Flood Estate [64] a petition for partial distribution, claiming that she was entitled to two-ninths of said estate as the daughter and pretermitted heir of said decedent and asking for distribution of a portion of said estate to her. That a trial of the matters set forth in the petition for partial distribution was had before a jury and the trial court directed a verdict against the petitioner and in favor of the estate in August 1931. That an appeal was taken from the order directing a verdict against her as aforesaid and on the 18th day of April, 1933 the Supreme Court of the State of California (in Bank) reversed the decision against the petitioner and remanded the cause for a new trial and a remittitur was filed May 20, 1933.

VI.

That between May 20, 1933 and February 28, 1934, a compromise settlement was arranged between Constance May Gavin and the representatives of said estate whereby the following things were to be, and the same were done.

1. The litigation between the parties was to be settled and terminated and was settled and terminated on February 28, 1934, in the manner hereinafter set forth.

2. Constance May Gavin was to receive two-thirds of the two-ninths of said estate sought by her in her said petition for partial distribution or four-twenty sevenths of said estate that became available for distribution and she and her assigns received that portion of said estate.

3. Constance May Gavin was to sign and deliver to the representatives of the Estate of James L. Flood, the original of that certain document in evidence marked Exhibit "B"; and she did sign and deliver that document to the representatives of said estate.

4. Constance May Gavin was to permit and on the said 28th day of February 1934, did permit her petition for partial distribution to come on for hearing without a contest and the originals of the Minutes, Findings of Fact, Conclusions of Law and Judgment [65] disposing of said petition in evidence marked Exhibit "C" were made and entered on that date and said judgment has become final. Said petitioner was to and did consent to the use of said document referred to as Exhibit "B" in Item 3 above for the purpose of supporting said Findings of Fact, Conclusions of Law and Judgment.

5. The Decree of Final Distribution of the Estate of James L. Flood in evidence marked Exhibit "D" was to be, and was, made and entered by the Probate Court on February 28, 1934 and said Decree provided for the distribution of four-twenty sevenths of the said estate to Constance May Gavin and her assigns and the said distributions therein provided for were made to said petitioner and her assignees.

VII.

That Plaintiff in an effort to comply with the demands of the Revenue Department, filed the original of that certain Income Tax Return for the year 1934, a copy of which is in evidence marked Exhibit "E". That said return included as income the value of the property received by her in said settlement and the tax liability thereon of \$22,373.66 was based on the inclusion of said property as income.

VIII.

That the said Income Tax of \$22,373.66 shown by said return was duly paid by Plaintiff to the Collector of Internal Revenue for the Sixth District of California, together with interest thereon in the amount of \$4,997.88,

making a total of \$27,371.54 in the amounts and on the dates as follows:

September 3, 1938	\$ 3,000.00
October 3, 1938	1,000.00
November 3, 1938	1,000.00
December 2, 1938	22,371.54
<hr/>	
Total	\$27,371.54

IX.

On May 9, 1941, plaintiff filed with the said Collector of Internal Revenue for the Sixth District of California a claim for [66] refund of the said 1934 individual income taxes of \$22,373.66 and interest thereon of \$4,997.88 paid by plaintiff to said Collector, plus interest thereon.

X.

On January 6, 1943, the Commissioner of Internal Revenue disallowed said claim for refund in full by sending a notice to that effect by registered mail to the plaintiff.

CONCLUSIONS OF LAW

From the foregoing Findings of Fact, the Court concludes, as follows:

I.

That none of the value of the property received by the plaintiff in the said compromise settlement of her said litigation for a share of said estate constituted taxable income to her.

II.

That the said tax of \$22,373.66 and interest thereon in the sum of \$4,997.88 paid by plaintiff to the defendant

through its agents and employees during 1938, was illegally, erroneously and wrongfully assessed and collected.

III.

That plaintiff has overpaid her individual income taxes for the year of 1934 in the sum of \$27,371.54 and that the whole amount thereof, together with interest thereon is now due and owing to said plaintiff from the defendant herein.

IV.

The plaintiff herein is entitled to recover from the defendant the sum of \$38,463.30 with interest as provided by law.

V.

The plaintiff have and recover her costs herein.

VI.

Judgment should be entered herein for the plaintiff and [67] against the defendant for the said sum of \$38,463.30, with interest as provided by law.

Dated this 20th day of August, 1945.

BEN HARRISON

United States District Judge

Approved as to form:

CHARLES H. CARR—E.H.

E. H. MITCHELL—E.H.

GEORGE M. BRYANT—E.H.

EUGENE HARPOLE

Attorneys for Defendant.

[Endorsed]: Filed Aug. 20, 1945. [68]

In the District Court of the United States

Southern District of California

Central Division

No. 4139-BH Civil

CONSTANCE MAY GAVIN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT FOR PLAINTIFF

The above entitled cause having come on regularly for trial on July 31, 1945, in the above entitled court, before the Honorable Ben Harrison, Judge thereof presiding, without a jury, Leslie L. Heap, Esq., appearing for plaintiff and Eugene Harpole, Esq., Special Attorney for Bureau of Internal Revenue, and George M. Bryant, Esq., Assistant United States Attorney, appearing for Defendant; and evidence having been introduced and said cause having been argued and submitted for decision; and findings of fact and conclusions of law having been made and filed;

It Is Therefore Hereby Adjudged and Decreed that plaintiff have and recover from the defendant the sum of \$27,371.54, together with interest thereon in the sum of \$11,091.76, said sums in the aggregate amounting to \$38,463.30.

It Is Further Adjudged and Decreed that plaintiff [70] have and recover from defendant costs incurred herein in sum of \$.

Dated: August 20, 1945.

BEN HARRISON

United States District Judge

Approved as to form:

CHARLES H. CARR E.H.

E. H. MITCHELL E.H.

GEORGE M. BRYANT

EUGENE HARPOLE

Attorneys for Defendant

Judgment entered Aug. 20, 1945. Docketed Aug. 20, 1945. Book C. O. #34, Page 376. Edmund L. Smith, Clerk, by Murray E. Wire, Deputy.

[Endorsed]: Filed Aug. 20, 1945. [71]

[Title of District Court and Cause.]

STIPULATION FOR AMENDMENT OF THE JUDGMENT

It is hereby stipulated and agreed by and between counsel for the plaintiff and defendant, subject to the approval of the Court, that the recovery paragraph of the Judgment entered in the above-entitled action on August 20, 1945, may be amended to read as follows:

It Is Therefore Ordered, Adjudged and Decreed that the plaintiff have and recover of and from the defendant the sum of \$27,371.54, together with interest on \$3,000 from September 3, 1938, on \$1,000 from October 3, 1938, on \$1,000 from November 3, 1938, and on \$22,371.54 from December 2, 1938, as provided by law.

Dated: this 27 day of September, 1945.

LESLIE L. HEAP

Attorney for Plaintiff [72]

CHARLES H. CARR EH

United States Attorney

E. H. MITCHELL EH

Asst. United States Attorney

GEORGE M. BRYANT EH

Asst. United States Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

Attorneys for Defendant, United States
of America.

It Is So Ordered this 1st day of Oct., 1945.

BEN HARRISON

United States District Judge

[Endorsed]: Filed Oct. 4, 1945. [73]

In the District Court of the United States
Southern District of California

Central Division

No. 4139-BH

CONSTANCE MAY GAVIN,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

AMENDED JUDGMENT FOR PLAINTIFF

The above entitled cause having come on regularly for trial on July 31, 1945, in the above entitled court, before the Honorable Ben Harrison, Judge thereof presiding, without a jury, Leslie L. Heap, Esq., appearing for plaintiff and Eugene Harpole, Esq., Special Attorney for Bureau of Internal Revenue, and George M. Bryant, Esq., Assistant United States Attorney, appearing for Defendant; and evidence having been introduced and said cause having been argued and submitted for decision; and findings of fact and conclusions of law having been made and filed;

It is therefore ordered, adjudged and decreed that the plaintiff have and recover of and from the defendant the sum of \$27,371.54, together with interest on \$3,000 from September 3, 1938, on \$1,000 from October 3, 1938, on \$1,000 from November 3, 1938, and on \$22,371.54 from December 2, 1938, as provided by law.

It is further adjudged and decreed that plaintiff have and recover from defendant costs incurred herein in the sum of \$. [74]

Dated: Oct. 1, 1945.

BEN HARRISON

United States District Judge

Approved as to Form:

Attorneys for Defendant.

Amended Judgment entered Oct. 4, 1945. Docketed Oct. 4, 1945. Book C. O. 35, Page 199. Edmund L. Smith, Clerk, by Murray E. Wire, Deputy.

[Endorsed]: Filed Oct. 4, 1945. [75]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, the defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on August 20, 1945, and subsequently amended by stipulation on the 4th day of October, 1945.

Dated: this 19th day of November, 1945.

CHARLES H. CARR

United States Attorney

E. H. MITCHELL

Asst. U. S. Attorney

GEORGE M. BRYANT

Asst. U. S. Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

By Eugene Harpole

[Endorsed]: Filed & mld. copy to Lesley L. Heap, atty. for plf. Nov. 19, 1945. [76]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET CAUSE
ON APPEAL

Good cause appearing therefor, It Is Hereby Ordered that the time within which the defendant United States of America may file the record and docket the above entitled case in the United States Circuit Court of Appeals for the Ninth Circuit in its appeal from the final judgment entered in this action on August 20, 1945, and subsequently amended by stipulation on the 4th day of October, 1945, be and the same hereby is extended to and including February 16, 1946.

Dated: This 27 day of December, 1945.

BEN HARRISON
District Judge

[Endorsed]: Filed Dec. 27, 1945. [77]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

Whereas, the defendant in the above entitled action has taken an appeal from the judgment in this case to the United States Circuit Court of Appeals for the Ninth Circuit, and the record consists, among other things, of several written exhibits which were introduced in evidence by the parties;

Whereas, it is the desire of the parties hereto, in order to save time, labor and expense of making photostatic

copies, to facilitate printing and to permit inspection by the Appellate Court of the originals, that said original documents be sent to the said Court in lieu of copies;

Now, Therefore, it is hereby stipulated and agreed, by and between the parties, through their respective counsel undersigned, that the originals of all of plaintiff's and defendant's exhibits be sent to the Appellate Court in lieu of copies thereof. [81]

Dated: this 30th day of January, 1946.

CHARLES H. CARR EH
United States Attorney

E. H. MITCHELL EH
Asst. U. S. Attorney

GEORGE M. BRYANT EH
Asst. U. S. Attorney

EUGENE HARPOLE
Special Attorney
Bureau of Internal Revenue
Attorneys for Defendant-Appellee

LESLIE L. HEAP
Attorney for Plaintiff-Appellant

It Is So Ordered this 31 day of Jan. 1946.

BEN HARRISON
United States District Judge

[Endorsed]: Filed Jan. 31, 1946. [82]

[Title of District Court and Cause.]

STIPULATION RE RECORD ON APPEAL

It is stipulated by and between counsel for the respective parties hereto that the reporter's transcript of the hearing of the above entitled matter at the time of submission on the 31st day of July, 1945 may be included in the record on appeal herein.

Dated: February 1, 1946.

CHARLES H. CARR E.H.

United States Attorney

E. H. MITCHELL E.H.

Asst. U. S. Attorney

GEORGE M. BRYANT E.H.

Asst. U. S. Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

Attorneys for Defendant-Appellant

LESLIE L. HEAP

Attorney for Plaintiff-Appellee

[Endorsed]: Filed Feb. 5, 1946. [83]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 83 inclusive contain full, true and correct copies of Complaint for Recovery of Individual Income Taxes

and Interest Thereon; Answer; Minute Orders Entered May 8, 1945, May 14, 1945 and June 14th, 1945 respectively; Notice of Motion for Judgment on Pleadings; Motion for Judgment on Pleadings; Plaintiff's Reasons and Points and Authorities in Support of Motion for Judgment on Pleadings; Defendant's Memorandum of Points and Authorities in Opposition of Motion for Judgment on the Pleadings; Plaintiff's Reply to Defendant's Memorandum of Points and Authorities Opposing Motion for Judgment on Pleadings; Minute Orders Entered July 2, 1945, July 5, 1945 and July 31, 1945 respectively; Stipulation of Facts; Minute Order Entered August 2, 1945; Memorandum Opinion; Minute Order Entered August 20, 1945; Findings of Fact and Conclusions of Law; Memorandum re Interest in Judgment; Judgment for Plaintiff; Stipulation for Amendment of the Judgment; Amended Judgment for Plaintiff; Notice of Appeal; Order Extending Time to Docket Cause on Appeal; Appellant's Designation of Record on Appeal; and two Stipulations re Record on Appeal which, together with Original Exhibits A to E inclusive and copy of Reporter's Transcript, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 11th day of February, A. D. 1946.

(Seal)

EDMUND L. SMITH,
Clerk,

By Theodore Hocke
Chief Deputy Clerk.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF PROCEEDINGS

* * * * *

Los Angeles, California, July 31, 1945;

10:00 o'clock a. m.

The Court: Are you ready to proceed, gentlemen?

Mr. Heap: We are ready, your Honor.

Mr. Harpole: The Government is ready.

The Court: You may proceed.

Mr. Heap: Your Honor, we spent a great deal of time trying to arrive at a statement of facts. Your Honor knows when we started out in this thing that was the intention but a question arose because there were certain facts leading up to the making of the documents which we thought were a part of the facts and the Court ought to have all of the facts and not just a part of the facts.

I have here two copies of a stipulation in connection with which we have certain exhibits which we have not attached but we referred to them here and we have the exhibits which we will put in.

We made this stipulation. It was rewritten a number of times and we think we both understand it. We know what is intended by it and I don't think there is going to be any question concerning it at all.

The Court: May I see the stipulation?

Mr. Heap: Yes, your Honor. When we prepared it the last time we did not know whether there was one paper that is referred to in there, I think on page 3, whether it existed [2*] or not but I find, apparently, we

*Page numbering appearing at top of page of original Reporter's Transcript.

have discovered that it did so we will not have to modify it in that connection at all.

May I say this, Mr. Harpole and I agreed on this point that by making the stipulation the parties are not stipulating to the truth of the statements in the documents. We are putting the documents in.

There is one document which we have stipulated Mrs. Gavin signed as a part of the settlement arrangement but we did not want her to stipulate to the truth of the statements in that document because we would be asking her to say something which she would feel was untrue.

Now, we had intended this morning, I told Mr. Harpole yesterday, subject to any proper objections, to have two witnesses here—Mrs. Gavin and her husband.

All last week and up to the present time both of them have been quite seriously ill. I talked to Mrs. Gavin twice yesterday and I thought she was going to make it. The doctor gave her some hypos last night and the nurse this morning refused to let me talk to her so I cannot get her in here this morning at all.

Let us put in the exhibits and then the Court will know what we are talking about.

The Court: Let me read this stipulation. You may introduce the exhibits, whoever has them.

Mr. Heap: Yes, your Honor, paragraph 4, an exhibit [3] which we have indicated would be marked Exhibit A, which is the Supreme Court opinion.

The Court: Is it necessary to introduce that into the record, gentlemen? Can't we take judicial notice of that instead of building up a big record?

Mr. Heap: We wanted to have it in. We discussed it and decided it would be more convenient. It is not terribly long.

The Court: It will be admitted.

The Clerk: Plaintiff's Exhibit A.

(The document referred to was received in evidence and marked Plaintiff's Exhibit A.)

Mr. Heap: And Exhibit B I think Mr. Harpole has, is that correct?

Mr. Harpole: Yes.

Mr. Heap: I have only a copy on yellow paper. This is the statement referred to as Exhibit B.

I think, Mr. Harpole, you have a portion of Exhibit C. There are three papers in that. Maybe it would be better to mark them C-1, 2 and 3 or clip them together and mark them under one exhibit number.

The Court: There are different ones referred to. The document designated "Agreement," dated February 28, 1934, will be marked B.

(The document referred to was received in evidence and marked Plaintiff's Exhibit B.) [4]

Mr. Heap: In paragraph 4 we have three different papers which we have indicated may be marked Exhibit C but if the Court thinks it would be more convenient we might refer to them as C-1, C-2 and C-3.

The Court: You have a stipulation marked Exhibit C and I think those documents should be so marked.

Mr. Heap: All right.

(The document referred to was received in evidence and marked Plaintiff's Exhibit C.)

Mr. Heap: We also stipulate that the documents in Exhibit C are correct copies but they will be subject to correction if we find they are not. We think they are. One of them just came in and we have had no opportunity

to determine whether it is an accurate copy or not. We think it is.

The decree of distribution, Exhibit D referred to in paragraph 5 at the bottom of page 3 of the stipulation, and to this is attached a copy of the will, it is a part of the decree of distribution, so it should go in with it, and may we say that with reference to Exhibit B in the body of it it refers to a certain paper which is not attached to this exhibit but that is a copy of the will that is attached to it now. We have a copy of the will attached to the decree so Mr. Harpole and I figured just so it is understood that Exhibit B is complete except that it does not have a copy of the will attached to it, but there is a copy of the will attached to [4] the decree.

Exhibit E is a certified copy of the tax return with some statements attached to it. The only other exhibits referred to in the stipulation are the two exhibits which are attached to the complaint. Those are mentioned in paragraphs 8 and 9 of the stipulation but they are not to be introduced separately. They are already attached to the pleadings that are in.

It is my understanding with Mr. Harpole that this stipulation covers the facts but does not necessarily cover all the facts that are admitted by the pleadings. It may overlap and cover some of the facts that are admitted by the pleadings, but I do not believe that either of us have verified the fact of whether it covers each and every one of the facts that are set forth in the pleadings.

In other words, the stipulation is not intended to exclude any facts that are admitted by the pleadings.

Mr. Harpole: That is true, your Honor. The stipulation only covers the facts that it mentions and any-

thing that is admitted in the pleadings we, of course, stand by that.

Mr. Heap: Now, there is one thing perhaps should be cleared. I think it is clear in the record as it stands. In the stipulation certain persons are referred to at the top of page 4, or her assignees.

Under the decree of distribution as shown by the stipulation here and by the decree, substantially half of the property which was given in settlement was distributed directly to the persons designated in the stipulation as her assignees.

In the stipulation or statement of facts as I previously prepared it, I indicated who those persons were but I think Mr. Harpole will stipulate with me that they were her investigator and an attorney who handled that case for her.

Mr. Harpole: That is true.

Mr. Heap: Now, as I say, your Honor, we intended to have some witnesses here this morning.

The Court: What witnesses and for what purpose?

Mr. Heap: I was just going to say. And it may be that Mr. Harpole would stipulate with me or we can determine what to do about it. While all of the papers here bear the date of February 28, excepting that tax return, which would indicate that they were made and dated on the 28th of February 1934, I wanted to clear that fact so there wouldn't be any doubt about it as to showing that all of those papers were prepared in connection with the settlement arrangement prior to the 28th of February 1934 and dated that date. That is, they were all prepared as a part of the settlement arrangement and passed upon and approved by the parties and that all of the settlement—that is, all of the papers

were all used at the same time. I believe that is shown by the minutes that I [6] have introduced.

Mr. Harpole referred to the Exhibit B, I believe it is, as being in the nature of a declaration against interest.

The Court: Let us get the evidence in and then we will have the arguments.

Mr. Heap: I wasn't going to argue. I was going to say why he referred to that as a declaration against interest which on the face of it it appears to be and for that reason—in other words, one of the papers that was prepared in connection with the settlement as a part of the settlement she was to—

The Court: That is a part of the settlement, isn't it?

Mr. Heap: That is right.

The Court: And it isn't a separate document?

Mr. Heap: It is a separate paper but it is one of the papers that was made in connection with the settlement. It is listed as No. 3 on page 3 of the stipulation.

The Court: And that is the agreement of—

Mr. Heap: It is designated as an agreement. It is signed only by one person. We finally determined on using the word "document" designated "A" as an agreement.

The Court: Is that the part that states she will not at any time assert her claim?

Mr. Heap: That is correct. And in the first part of it she makes statements which are diametrically opposed to her [7] claims and contentions in the estate and I felt that in view of the fact that it appeared to be a paper signed by her which stated things contrary to what she had alleged in the case, that her testimony in connection with it would be proper to explain whether

or not the statements there were true and why she signed them.

The Court: She just waived her claim, didn't she, either to claim or assert for herself and her heirs.

Mr. Heap: That is right. Let me say this. I think I can clear it satisfactorily. When the settlement was arranged she agreed to sign that paper for two purposes. One was to create a bar to future claims, to definitely settle the thing and as we have stated in our stipulation so that that paper could be used to support a judgment against her and they brought the matters on and, as the minutes show, the judgment was made and the decree of distribution and the three accounts and the final account were all done and the distribution at the same time on the statement of counsel for the respondents, and the other attorneys for her were there and they said nothing. They came in in pursuance to the settlement arrangement and allowed that to be done and it was carried out. I don't think we have any dispute on it. The only thing was that Mr. Harpole on some things says he did not personally have any knowledge as to some of the things and therefore didn't want to stipulate to them. [8]

Mr. Harpole: We cannot stipulate to the things leading up to the settlement. They are not in writing.

The Court: The settlement takes the place of the negotiations anyhow.

Mr. Harpole: The Government relies on the written documents that evidence the settlement.

The Court: Gentlemen, the case simply resolves itself down to this legal proposition: Where a person who claims to be an heir without any determination of heirship enters into a settlement and under a decree of distribution receives a portion of the estate, is that which

he receives income or is it exempt under the statute? Isn't that the sole question? The same question we argued before.

Mr. Harpole: That is the way we see it. It is simply a question of whether she received an inheritance or received something else. Everybody agrees she got the money out of the estate. There is no dispute about that and no dispute about how much.

The Court: She received it through the decree of distribution by virtue of a settlement with a portion or with all the beneficiaries of the estate.

Mr. Harpole: By virtue of the settlement and judgment—the judgment that preceded the decree of distribution. It was made on the same day.

The Court: Is there any portion of that decree of dis- [9] tribution that should be called to the Court's specific attention? It is all right to hand a document of a good many pages, and most of it being recitals—

Mr. Heap: I think I can clear that in the Court's mind. Pursuant to what I have stated and the stipulation the parties agreed that they would allow this petition of hers to come on without contest and they did that. Mr. Roach made the statement as shown by the minutes there.

The Court: Where are the exhibits?

Mr. Heap: Exhibit C, the top paper.

The Court: Let me read this exhibit. It says "The same is denied."

Mr. Heap: That is right. Pursuant to the agreement they went in and allowed the consent judgment to be made and then the decree of distribution recites in exactly the same language as the last page of the findings and conclusions and then proceeded to distribute the property to her.

The Court: Did that occur all on the same date?

Mr. Heap: That is right, as indicated by the minutes. They did all those things at the same time. It was all prearranged. Instead of dismissing with prejudice they went in and—

The Court: And the Court found she was not a daughter?

Mr. Heap: That is right.

The Court: Is there anything more to be said about this [10] case that hasn't already been said in our discussion before and in the briefs that have been submitted?

Mr. Harpole: I think perhaps there is a case or two that have some bearing that have not been discussed. At least there was one case in existence which perhaps was not cited at the time of our last distribution which has been reversed by one of the Circuit Courts since that time. That was *Dumont v. Commissioner*. That was reversed by the Third Circuit on the 11th of this month.

The Court: Where was that?

Mr. Harpole: Went up from the Tax Court.

The Court: What is the citation?

Mr. Harpole: Tax Court, page 158. It is quite a recent case. 41 Board of Tax Appeals and 31 Board of Tax Appeals. The 41 Board of Tax Appeals was the Keller case and the 31 was the Kearney case.

Incidentally, your Honor asked us at the last hearing whether the Keller case in 41 had been acquiesced in and I have since checked and it has.

The Dumont case also refers to the Third Circuit opinion. It refers to it in 122 Fed. (2d) 480.

The Court: What was the last citation you said that was just recently reversed?

Mr. Harpole: In the tax service. It is paragraph 72617.

The Court: Do you have it with you? [11]

Mr. Harpole: I do. I have the decision. I will be glad to leave it with your Honor.

The Court: Where does this help us?

Mr. Harpole: There is considerable discussion down in the body of the opinion about the necessity of a person who seeks to come within the exemption having an actual standing as an heir or legatee.

Mr. Heap: Which case is that?

Mr. Harpole: Dumont case.

Mr. Heap: You have cited that before.

The Court: The decisions are to the effect that we are to look at the substance and not the form. In this case we have a bona fide contest. There was a real close question—so close that the Supreme Court sent it back for retrial after the Superior Court had directed a verdict and before retrial the parties settled and executed a number of papers and if the parties are to be bound by these papers they ought to have sued for obtaining money under false pretenses because under your own claim here she was not entitled to anything.

If there is nothing more, gentlemen, the case will stand submitted.

Mr. Harpole: Do you wish to keep the opinion in the Dumont case?

The Court: No, because I have read the syllabus. The 41 Tax Court case does not seem to be in accord with it. I [12] will be glad to read it over.

Mr. Heap: It specifically upholds the Keller case.

The Court: I want to say frankly this is the first time I have been involved in a tax case where a compromise settlement has been entered into. The Court recognizes that compromises are favored under the law but is it going to be that every time parties make settlements they are going to be subject to review under our tax procedure? It seems to me, in view of the Government's position in this case, the Government should also go after the other parties because you are in this situation—if this plaintiff was a daughter and only received two-thirds of that to which she was entitled the other heirs or beneficiaries received more than they were entitled to.

Mr. Harpole: I think, your Honor, in this case it was not the other heirs that got it. It was a charitable institution that received it.

The Court: But are we going to in this court rehash compromises and retry them to determine who was entitled to the property and who was not in order to determine income? Not now in an estate matter like this, under the present rate of taxation; it would have been impossible for these people to have settled because the taxes would have consumed the entire estate.

Mr. Harpole: What I was starting to say was the Govern- [13] ment would not go after the people that got the rest of the money because that distribution was exempt anyway. It went to charity.

The Court: That may be the case in this proceeding.

Mr. Heap: Some of it—not all of it.

Mr. Harpole: You will find in the Sage case where the thing that you suggested should be done was done. The Government did tax a charity. It was Amherst College.

The Court: They tried to.

Mr. Harpole: And it succeeded in that case.

The Court: Is there any particular part of these documents that you gentlemen specifically desire to call the Court's attention to? I understand the part of the agreement that you are relying upon is where she covenants not to make any claims as an heir and the judgment of the Court finding that she was not an heir, in Exhibit C. That is the part, is it not, that you are relying upon—that she was in fact not an heir?

Mr. Harpole: The findings of facts, conclusions of law, the judgment and the decree of distribution all make the finding that she was not the child of Flood, and also that Flood left two children and that he left no other decedents.

The Court: The case will stand submitted, gentlemen.

(Whereupon the above-entitled matter was concluded.) [14]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8 day of February, A. D. 1946.

JACK D. AMBROSE,
Official Reporter

[Endorsed]: Filed Feb. 8, 1946. [15]

[PLAINTIFF'S EXHIBIT A]

In the Supreme Court of the State of California

(In Bank—April 18, 1933)

In the Matter of the Estate of James L. Flood, Deceased.

Petition of Constance May Gavin for Partial Distribution.

Constance May Gavin, Appellant, v. The Protestant Episcopal Bishop of California (a Corporation Sole) et al., Respondents. S. F. No. 14581.

Langdon, J.—

This is an appeal by petitioner, Constance May Gavin, from a decree of the probate court denying her application for partial distribution. The sole question presented to this court is whether the case should have been submitted to the jury, the court having directed a verdict against petitioner and in favor of respondents. In our opinion, the court erred in so doing, and the judgment must be reversed.

The decedent, James L. Flood, died testate, leaving a surviving widow, Maud Lee Flood, and two children, Mary Emma Stebbins and James Flood. The estate, appraised at \$8,565,507.85, was by the terms of his will distributed among said widow and children, Cora Jane Flood, a sister of the decedent, since deceased, and various charitable institutions, respondents herein. Petitioner alleged that she was the illegitimate daughter of the testator, and claimed a share ($\frac{2}{9}$) of the estate as a pretermitted heir, under Probate Code, section 90 (formerly sec. 1307 of the Civil Code). Respondents answered, and a trial was had before a jury. At the close of all the

(Plaintiff's Exhibit A)

evidence, upon motion by respondents, the trial court directed the jury to bring in a verdict against petitioner and in favor of respondents. Judgment was accordingly entered thereon, denying the application for partial distribution. A motion for a new trial was made and denied. Thereupon petitioner brought this appeal from the judgment and order denying the motion for new trial.

Probate Code, section 255, is not involved in this proceeding, petitioner's claim being based upon legitimation under section 230 of the Civil Code, which reads as follows: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth . . ." To establish her claim of legitimation under this section as construed by a number of decisions of this court, petitioner must sustain the burden of proof of the following elements: (1) Illegitimacy: that she is an illegitimate child; (2) paternity: that James L. Flood was her father; (3) public acknowledgment: that he publicly acknowledged her as his own child during her minority; (4) reception into the family with wife's consent: that she was received into his family with his wife's consent, given with knowledge of the illegitimacy (5) treatment as legitimate: that he otherwise treated petitioner as if she were his legitimate child. (See, generally, *Estate of Baird*, 193 Cal. 225 [223 Pac. 974]; *Estate of Gird*, 157 Cal. 534 [108 Pac. 499, 137 Am. St. Rep. 131]; *Estate of Jones*, 166 Cal. 108 [135 Pac. 288].) It is admitted by the pleadings that petitioner

(Plaintiff's Exhibit A)

is an illegitimate child, the daughter of Eudora Helen Forde Willette, born out of wedlock May 11, 1893, at San Francisco. The evidence is also undisputed that petitioner was received into the family of James L. Flood with the consent of his wife, and lived there for some time during her youth, where she was treated as if she were his legitimate child. The controversy, therefore, centers about the three remaining elements, paternity, public acknowledgment, and knowledge of Mrs. Flood of petitioner's illegitimacy.

Before proceeding to discuss the evidence, it is necessary to set forth the rule governing the power of the trial court to direct a verdict. This matter has been before the courts of this state on numerous occasions, and the principles were recently reviewed in *Estate of Lances*, 216 Cal. 397 [14 Pac. (2d) 768], wherein this court said (p. 295):

"It has become the established law of this state that the power of the court to direct a verdict is absolutely the same as the power of the court to grant a nonsuit. A nonsuit or a directed verdict may be granted 'only when, disregarding conflicting evidence and giving to plaintiff's evidence all the value to which it is legally entitled, herein indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff if such a verdict were given'. (*Newson v. Hawley*, 205 Cal. 188 [270 Pac. 364]; *Perera v. Panama Pacific Int. Exp. Co.*, 179 Cal. 63 [175 Pac. 454]; *Estate of Sharon*, 179 Cal. 447 [177 Pac. 283]; *Estate of Gallo*, 61 Cal. App. 163, 175 [214 Pac. 496]; 24 Cal. Jur., pp. 912-

(Plaintiff's Exhibit A)

918.) Unless it can be said as a matter of law that, when so considered, no other reasonable conclusion is legally deducible from the evidence, and that any other holding would be so lacking in evidentiary support that a reviewing court would be impelled to reverse it upon appeal or the trial court to set it aside as a matter of law, the trial court is not justified in taking the case from the jury. (Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 228 [263 Pac. 799].) A motion for a directed verdict 'is in the nature of a demurrer to the evidence, and is governed by practically the same rules, and concedes as true the evidence on behalf of the adverse party, with all fair and reasonable inferences to be deduced therefrom . . . Even though a court might be justified in granting a new trial it would not be justified in directing a verdict on the same evidence . . . The power of a court in passing upon such motions is strictly limited. It has no power to weigh the evidence, but is bound to view it in the most favorable light in support of the verdict . . . If, in the opinion of the court, the evidence is unreliable, it is its duty to grant a new trial, and it may grant such a trial even where there is substantial evidence to sustain the verdict, if it believes that the evidence preponderates against the verdict.' (Hunt v. United Bank & Trust Co. of California, 210 Cal. 108, 117, 118 [291 Pac. 184, 188].) In other words, the function of the trial court on a motion for a directed verdict is analogous to and practically the same as that of a reviewing court in determining, on appeal, whether there is evidence in the record of sufficient substance to support a verdict. *Although the trial court may weigh the evidence and judge of the credibility of the witnesses on a*

(Plaintiff's Exhibit A)

motion for a new trial, it may not do so on a motion for a directed verdict." (Italics ours.)

Two important propositions should be noted in the above quotation. First, the trial court, on a motion by a defendant for a directed verdict, cannot weigh all the evidence introduced by both sides; all evidence in conflict with the plaintiff's evidence must be disregarded. Second, the trial court, in determining such motion, cannot judge the credibility of witnesses, but must give to the Plaintiff's evidence all of the value to which it would be legally entitled if the witnesses were believed. If extraordinary situations may be conceived in which these rules would yield to exceptions, the instant case is not one of them, and it must be governed by the rules, which must now be considered as settled in this state by a long line of authorities. (See, also, *Topley v. Zeeman*, 216 Cal. 182 [13 Pac. (2d) 666]; *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 552 [299 Pac. 529]; *Bannister v. Los Angeles Ry. Corp.*, 203 Cal. 427 [264 Pac. 631]; *Estate of Caspar*, 172 Cal. 147 [155 Pac. 631].) Such cases as *Diamond v. Weyerhaeuser*, 178 Cal. 540 [174 Pac. 38], where the court found the case for the plaintiff wholly lacking in the elements to justify recovery, and therefore held it proper to direct a verdict, are not inconsistent with these rules. We proceed, then, upon the basis that petitioner was required merely to offer competent evidence of such a substantial nature that it might reasonably be inferred therefrom that she was the illegitimate daughter of James Flood, legitimated in conformity with Civil Code, section 230.

Certain facts constituting the background of this case must be briefly stated. Mrs. Alfredeta Forde, a widow,

(Plaintiff's Exhibit A)

came to California from Boston with her daughter Eudora Helen Forde (now Eudora Forde Willette), and her son Ferdinand David Forde, in 1891. They lived in Los Angeles until June, 1892. They were in constant financial distress. The mother, a former actress, attempted to support her daughter by giving dramatic readings, and the son, a violinist, occasionally was engaged to play at dances and banquets. Later, the daughter commenced her theatrical career with a stock company. According to her testimony they met a "Dr. Victor Sturm" in Los Angeles, who represented himself to be a retired physician from the east. In June, 1892, Mrs. Forde and Eudora came to San Francisco, Ferdinand following shortly afterward. They stayed at the Russ House, a hotel, for about a month. Eudora testified that Dr. Sturm then arrived, that they became engaged, that she ordered a trousseau for which he was to pay, and that he then disappeared, leaving them with numerous unpaid debts. They moved to the Grosvenor, and then to the Langham hotel, at Ellis and Mason Streets. For a short time, Mrs. Forde was engaged as an actress at the Grove Street theater, on Grove between Polk Street and Van Ness Avenue. The mother and daughter moved from the Langham to a boarding-house, and changed lodgings again several times thereafter.

While living at one of these houses Eudora discovered that she was pregnant. She testified that she consulted a priest concerning her plight, asking whether she might not take the name of a married woman; that he permitted her to do so, telling her that she could treat the matter as a spiritual marriage; that she thereupon took the name of "Mrs. Stearn", which, she says, was familiar

(Plaintiff's Exhibit A)

to her as the name of a department store in Boston. In April, 1893, Mrs. Forde and Eudora rented a room at 628 Eddy Street, and early in May moved next door to a boarding-house at 626 Eddy Street. On May 11, 1893, Eudora gave birth to a daughter. On May 19, 1893, the child was baptized and a baptismal record made, in which the child's name was entered by the priest as "Constans Marguerite Stern", and the parents' as "Eudora Ford" and "Victor Stern". The name actually given to the child, petitioner herein, was Constance Marguerite Stearn.

In August, 1893, when the child was about three months old, she was taken into the family home of James L. Flood at 1890 Page Street. He was then thirty-six years of age, had been married to Marie Rose Flood for six years, and had no children. Upon the reception of the child into the Flood family, the financial condition of Mrs. Forde and Eudora improved considerably, many of their bills being paid and large additional sums being given them from time to time. The Floods changed the child's name from "Constance Marguerite" to "Constance May", and she was known as "Constance May Flood". Some time prior to May, 1894, Mrs. Flood acquired a summer home at Alma, Santa Clara County, where she lived with her husband and petitioner during the summer. In August, 1896, she secured a residence at 1816 Pacific Avenue, San Francisco. On January 15, 1898, Mrs. Flood died. Shortly thereafter, on February 23, 1898, James Flood made a trip to the Orient, taking with him his sister-in-law, Maud Lee Fritz, and brother-in-law Walter Fritz, Constance, and a valet and maid. He returned June 7, 1898. At the conclusion of the trip, Maud

(Plaintiff's Exhibit A)

and Walter Fritz remained with him at Alma, and their parents, Mr. and Mrs. John Fritz, and their brothers, John and Beaumont Fritz, came out from their home in Kansas City at Mr. Flood's invitation. Mr. Fritz, John and Beaumont spent the summer and part of the fall there, and Mrs. Fritz, Maud and Walter stayed until January 1, 1899, when they went to Kansas City accompanied by Mr. Flood and Constance. It was arranged that Mrs. Fritz was to rear Constance in her home, and Flood thereupon left her and returned to San Francisco. He went back to Kansas City and soon afterwards, and on February 9, 1899, was married to Maud Lee Fritz, sister of his deceased wife. They went to Europe, returned and established their home at Menlo Park, San Mateo County. A child, Mary Emma, was born to them on July 7, 1900. Constance remained in Kansas City with the Fritz family until July, 1901, attending St. Theresa's Academy there for a time.

Some time in July, 1898, Colonel Henry I. Kowalsky, an attorney representing Mrs. Forde and Eudora, sought to obtain money for them from Mr. Flood. On August 1, 1899, Flood paid to Colonel Kowalsky for Eudora, the sum of \$5,000, receiving from him a document entitled "Declaration of Abandonment", which was an affidavit of Eudora Forde, stating that Constance was the child of herself and her husband "Edward Stearn"; that her husband had died in New York in 1894; and that she had abandoned the child and relinquished all claims to its custody and control. Of the \$5,000 thereby received for Eudora, Colonel Kowalsky retained \$1200 as his fee. The statements in this affidavit respecting parentage were admittedly false, and Eudora testified that she did not

(Plaintiff's Exhibit A)

know what she was signing. She further testified that Flood knew her under the name of "Miss Dora Forde".

Shortly before July, 1901, Mrs. Forde wrote to Flood on behalf of herself and Eudora, asking that Constance be returned to them. After consultation with his attorney, Mr. Flood had Constance brought to San Francisco. On July 13, 1901, a meeting was held at Mr. Flood's office, at which Flood, according to evidence presented by respondents offered either to return the child, or to educate her during her minority. The latter arrangement was decided upon, and on July 22, 1901, Constance was taken by her nurse to "Ramona Convent" at Shorb (now Alhambra), Los Angeles County. Flood paid the sum of \$7,000 into a trust fund for her expenses for a period of ten years. She remained a boarder in the convent until June, 1911, and was there known as "Constance May Stearn". While there, she became intimate with the two daughters of Senator Robert N. Bulla, frequently spending her week-ends with them. At the conclusion of the ten-year period, she left the convent and went to live at the home of Senator Bulla. He lived in Alhambra with his two children and his sister-in-law, Mrs. Bertha Welfare. Constance made her home there for over nine years, receiving her board and lodging, and a monthly allowance from him of thirty dollars for clothing and incidentals, which was the amount given by him to each of his daughters.

Some time in 1917 petitioner became engaged to be married to John P. Gavin, her present husband, and on April 16, 1917, she wrote to Mr. Flood asking information as to her parentage. Receiving no reply, she wrote again on May 17, 1917. Thereafter, in June, 1917, James

(Plaintiff's Exhibit A)

E. Walsh, Mr. Flood's secretary, called at Senator Bulla's home, and told her that according to Mr. Flood's information she was the daughter of Edward Stearn and Eudora Forde Stearn. Upon his return, Walsh sent her, in care of Senator Bulla, an extract from the affidavit of Eudora, to the same effect. After leaving Senator Bulla's home, petitioner was employed for some time as a domestic servant in Los Angeles. On May 11, 1921, when she was twenty-eight years of age, she was married to John P. Gavin at Los Angeles, and has lived there with her husband ever since. On November 30, 1922, being ill and in financial distress, she wrote to Mr. Flood, telling of her condition and appealing for aid, but received no reply. In 1918 and 1923, when visiting San Francisco, she attempted to see Mr. Flood, but in each instance was informed that he was out.

James Flood died February 15, 1926. About two months later, petitioner visited in San Francisco, and consulted a firm of attorneys as to her possible right to a share in the estate. Thereafter various investigations and conferences took place, resulting in the commencement of this proceeding.

It is the theory of petitioner that James L. Flood met Eudora Forde soon after she came to San Francisco, had sexual relations with her, that petitioner was the result of the union, and that Flood and Mrs. Flood took her into their home with knowledge of these facts. Respondents advance the theory that Eudora Forde, while accompanying her mother to the Grove Street theater at this time, met James S. Cannon, the property man (who died subsequently in 1911), became intimate with him, and that he was the father of petitioner. According to

(Plaintiff's Exhibit A)

this theory petitioner was taken into the Flood household as an act of charity by Mrs. Flood, who secured her husband's consent thereto. Both theories find their origin, to some extent, in the statements of Eudora Forde Willette, who from 1926 to 1931 persistently maintained to representatives of petitioner and of respondents, to newspaper men and to others, that Flood was the father, and subsequently testified at the trial that Cannon was the father. As will hereinafter appear, the testimony of this witness is unimportant on this appeal, for at most it creates a conflict with petitioner's case which must be disregarded in *determining* the propriety of the court's direction of the verdict. Moreover, it is impeached by prior inconsistent statements and by her conduct to such an extent that the jury might have disbelieved it, and her credibility should have been determined by the proper course of submission of the case to the jury. It was the admitted practice of this witness to maintain herself at the expense of the parties to the litigation. One witness, for example, testified that she told him on one occasion that Aureguy (petitioner's investigator) was behind in his payments, and that she might jump to the other side of the case. She denies making this statement, although the fact is that she did "jump" (because she became conscience-stricken, according to her testimony), and thereafter she received regular remittances from representatives of respondents.

We come now to the case for petitioner, the question being whether the testimony presented by her and all reasonable inferences therefrom, sufficiently establish the elements of legitimation set forth above. Her evidence falls into three classes: (1) Declarations and acts of Mr. Flood; (2) declarations and acts of Mrs. Rose Flood;

(Plaintiff's Exhibit A)

(3) declarations of others, which the trial court excluded.

Numerous witnesses, including servants, friends, neighbors and casual acquaintances, testified to the conduct and statements of Flood with respect to petitioner. He was greatly attached to the child, played with her constantly, embraced and kissed her frequently and affectionately. Photographs were introduced in evidence, showing the child at the table, or seated with Flood. He provided her with beautiful clothes, toys and trinkets. She was known in the household and among friends as "Baby Flood". She had visiting cards with the name "Constance May Flood" engraved thereon. A flower bed on the Alma estate contained the same name, and various trinkets carried her initials as "C. M. F." Packages and telegrams were received and sent in the name of Constance May Flood. Flood called her "baby", "my daughter", "my little daughter", "my little girl", "my darling daughter"; she called him "papa". He would take the child in his arms and say: "Who does sweetheart look like?" She would answer: "Papa". Their coachman testified that on one occasion when Flood was in the carriage with the child, he said to her, "Baby, what is papa going to have when we get up to the ranch?" She replied, "Whiskey and soda", and Mr. Flood said, "Baby knows what is good for papa". On his trip to the Orient, petitioner was constantly in his company. To the officers and passengers he made the same sort of declarations as he had made at his home, continually referring to the petitioner as his "daughter" or his "little daughter". The passenger lists of the "S. S. Belgic" and the "S. S. Gaelic", on which they traveled, read:

(Plaintiff's Exhibit A)

"Miss Constance M. Flood", and the captain's manifest of the "S. S. Belgic" read: "Miss C. M. Flood, 5, female, with father, J. L. F." On board the "Gaelic" he met an old friend, who asked him, "Whose child is that?" Flood replied: "It is my own. Doesn't she resemble me?" In Kobe, Japan, he placed the child on the hotel counter saying: "This is my baby, my Constance. my baby Constance May Flood; she can sing in French". Upon the return trip, Flood had printed and published at his expense a newspaper called "Sayonara", recording the events of the trip, and sent copies to all of the officers and passengers. In it was a picture of petitioner as "Miss Constance M. Flood", and the poem: "The Belgic Alphabet", containing the line: "F—is for Flood and his sweet little daughter".

The conduct of Mrs. Rose Flood was equally affectionate. As did the rest of the household, she called the child "baby Flood" or "Sunshine", and was present on many occasions when Flood referred to the child as his "daughter". One of the declarations of Mrs. Flood, which is chiefly relied upon by petitioner, appears in the testimony of Mrs. Adele Gahan, formerly Adele Cerles, nurse in charge of the child at Alma, during the ocean trip, and then at the Pacific Street home. She testified that in July or August, 1897, Mrs. Flood gave her an envelope containing money, and told her to take it to a "Miss Ford" on Mason Street; that she took the child with her to the place, inquired for the woman, and was told by an elderly lady that she was not in, but that she (the elderly lady) was the mother of the woman; that she gave this person the money, and that the lady then tried to coax the child to her, and after some effort said: "Isn't it too bad she doesn't know her grandmother?"

(Plaintiff's Exhibit A)

Upon her return, the witness testified, she told Mrs. Flood of the incident, and Mrs. Flood said to her: "Adele, I am going to tell you something, but on your word of honor you must promise that you will never reveal it to anybody. Baby Constance is the daughter of my husband, Mr. Flood, and Miss Ford, and Miss Ford is the mother."

The above evidence constituted the main case for petitioner. No attack was made upon the admissibility of this evidence, and the competency of such acts or declarations concerning family history (pedigree) is clearly established by statute and case law in this state. Section 1870, subdivision 4, of the Code of Civil Procedure makes admissible "the act or declaration, verbal or written, of a deceased person in respect to the relationship, birth, marriage, or death of any person related by blood or marriage to such deceased person . . ." Section 1852 of the same code provides: "The declaration, act, or omission of a member of a family who is a decedent, or out of the jurisdiction, is also admissible as evidence of common reputation, in cases where, on questions of pedigree, such reputation is admissible." Section 1870, subdivision 11, provides that "Common reputation existing previous to the controversy" is admissible in cases of pedigree. Under these sections, the acts and declarations of both Mr. Flood and Mrs. Rose Flood are competent to prove the paternity of petitioner. In *Estate of Heaton*, 135 Cal. 385 [67 Pac. 321], a situation similar to that involved herein was presented, and the court said: "One of the facts absolutely necessary to support the claim of legitimation is that Warren D. Heaton was the father of Jennie. Jennie came to the family of Mrs.

(Plaintiff's Exhibit A)

Ruth May when but an infant. A few years later Heaton and Mrs. May were married. Thereafter Jennie became a member of the family of Warren D. Heaton and his wife. Being *a member of their family*, the declarations of *either* were competent and relevant evidence upon the question of Jennie's paternity." (Italics ours.) (See, also, Estate of Hartman, 157 Cal. 206 [107 Pac. 105, 21 Ann. Cas. 1302, 36 L. R. A. (N. S.) 530]; In re Clark, 13 Cal. App. 786 [110 Pac. 828]; Estate of McNamara, 181 Cal. 82, 100 [183 Pac. 552, 7 A. L. R. 313]; 3 Wigmore, Evidence, sec. 1489, p. 226.)

The admissibility of this type of evidence being demonstrated and conceded, respondents' position is simply that the acts and declarations admitted in this case are not sufficient to establish the elements of legitimation, and particularly the element of paternity. Their principal contention is this: The declarations of a married man living with his wife, to the effect that a child in their home is his or their child, import that the child is the legitimate child of himself and his wife, and do not afford evidence that the child is the husband's illegitimate child. Starting with this proposition, they describe the statements of Mr. Flood as declarations that petitioner was his legitimate child, born in lawful wedlock, and not competent to show that she was his illegitimate daughter. In support of this theory, respondents offer sociological data on the common practice of married persons taking strange children into their homes, and also cite authorities, of which the following is typical: "The rule cannot be stated too broadly, that the description, 'child, son, issue', every word of that species, must be taken *prima facie* to mean legitimate child, son, or issue". (Wilkinson v. Adam, 1 V. &

(Plaintiff's Exhibit A)

B. 422, 462, 35 Eng. Rep. 163, 179.) The effect of these authorities would no doubt be that if petitioner were here claiming to be the legitimate child of James Flood, his declarations to the effect that she was his child would afford an inference of both parentage and legitimacy. But there is no authority which holds that these declarations mean legitimacy or nothing, and common sense would rebel against a notion so unreasonable. The rational view must necessarily be this: Flood's declarations were evidence of paternity, i. e., evidence that he was the father of the person whom he addressed and described as his "child" and his "daughter". In the absence of any other evidence, the inference would normally be that she was his legitimate child. But here the undisputed evidence shows, and the pleadings of all parties admit, that Eudora Forde and not Rose Flood was the mother of the child, and it follows that the inference of paternity, if drawn by the jury, would be an inference of illegitimacy and not legitimacy.

Looking at respondents' argument from another point of view, it would wholly prevent the proof of legitimation under Civil Code, section 230, by declarations and acts of a father who was married, for if he referred to the person merely as his child, this would not afford proof of illegitimacy, and if he referred to the person as his illegitimate child, this would constitute a failure to treat the child as legitimate, a positive requirement of the section. Thus, in *Estate of De Laveaga*, 142 Cal. 158, 168 [75 Pac. 790, 794], the court says: "But Jose Maria never received him into his family, or into or among his kindred, and did not treat respondent as if he were a legitimate child, but, on the contrary, *treated him and referred to him as an illegitimate child.*" (Italics ours.)

(Plaintiff's Exhibit A)

To require reference to the child as illegitimate would, therefore, prevent legitimation and defeat the very object of the statute. Analogous cases reject such a requirement. In *Blythe v. Ayres*, 96 Cal. 532 [31 Pac. 915, 19 L. R. A. 40], speaking of acknowledgment of an illegitimate child for purposes of inheritance, the court says (96 Cal. 589): "Blythe, in writing, acknowledged himself to be the father of Florence Blythe; Florence Blythe is an illegitimate child; therefore Blythe acknowledged himself to be the father of an illegitimate child. This logic is unassailable and no sound reason can be adduced why the acknowledgment should contain a declaration of bastardy." (See, also, *Estate of Loyd*, 170 Cal. 85 [148 Pac. 522].) We conclude that on the question of paternity the jury should have been permitted to determine the effect of the acts and declarations set forth above.

The second disputed issue relates to the element of knowledge by Mrs. Flood that petitioner was the illegitimate child of her husband. The evidence upon which petitioner relies is of two kinds. First are the declarations of James Flood, made in the presence of his wife, which, respondents concede, amount to the joint declaration of both spouses, that is, the express declaration of the declarant and the implied declaration of the other spouse who acquiesced therein. (See Code Civ. Proc., sec. 1870, subd. 3; *In re Clark*, 13 Cal. App. 786 [110 Pac. 828]; *Griswold v. Frame*, 48 Cal. App. 178, 183 [191 Pac. 962].) In this connection, section 1963, subdivision 27, of the Code of Civil Procedure is pertinent. It states, as a disputable presumption, that "acquiescence followed from a belief that the thing acquiesced in was

(Plaintiff's Exhibit A)

conformable to the right or fact". In re Clark, *supra*, deals with this precise question: "As to the third point, the acquiescence of Eliza Clark when introduced on two separate occasions as the sister of Jackson Freeman, is equivalent to an acknowledgment on her part of said relationship". Respondents attack this evidence on the ground already discussed, namely, that Flood's declarations import legitimacy, and hence could not establish knowledge of illegitimacy on the part of Mrs. Flood. In other words, their view would seem to be that Mrs. Flood must have understood by her husband's declarations that she was the mother of the child. We have already pointed out the weakness of their premise, and with that eliminated, the evidence is clearly of probative value. Second is the declaration of Mrs. Flood to Adele Cerles (Mrs. Gahan) that Flood was the father and Eudora Forde the mother of petitioner. Respondents launch a determined attack upon this testimony, pointing to alleged inconsistencies, falsehoods and prior statements and conduct of the witness, in an effort to discredit it completely and remove it from consideration as having no value at all. It would be a useless task to set forth the attempted impeachment and rehabilitation of this witness, for it is settled that the question of credibility is one for the jury, and the trial court, as already shown, cannot determine that question on a motion for directed verdict. (Estate of Lances, *supra*.) The point is clearly stated in Estate of Gird, 157 Cal. 534, 540 [108 Pac. 499, 502, 137 Am. St. Rep. 131]: "But, says counsel, there are eight separate reasons why Alice Bennett was not 'entitled to full credit', such as swearing to her own adultery, admissions and inconsistent acts. In reply we can only point to section 1847 of the Code of Civil Procedure, which, after de-

(Plaintiff's Exhibit A)

clarifying the manner in which a witness may be impeached, declares, 'and the jury are the exclusive judges of his credibility'." And in *Brandt v. Krogh*, 14 Cal. App. 39, 48 [111 Pac. 275, 279], it is said: "But no one will attempt to challenge the right of a jury or a judge, trying the facts, to believe and credit certain parts of the testimony of a witness who has been shown to have sworn falsely as to certain other material parts thereof." (See, also, *Archibald Estate v. Matteson*, 5 Cal. App. 441 [90 Pac. 723].) On this issue, likewise, the matter should have gone to the jury.

The third element of legitimation which respondents claim is lacking is the public acknowledgment of the relationship by Flood. This contention is made in spite of the numerous instances in which Flood made declarations of paternity to members of his household, friends, neighbors and complete strangers, in San Francisco, at Alma, on shipboard, in the hotel at Kobe, Japan, and to the world generally in the paper "Sayonara". It may be observed that this was not one of the grounds for the motion for directed verdict, and from a study of the court's opinion, appears not to have been a factor in its ruling. On its merits, however, the point deserves scant consideration. Basing their argument on *Estate of Baird*, 193 Cal. 225, 274-278 [223 Pac. 974], respondents asserted that there was no public acknowledgment because Flood did not acknowledge the relationship to his mother and his sister. In the cited case, *Baird*, an unmarried man, made admissions of paternity only in places where he carried on meretricious relations with the mother of the child, and not to the members of his own family (his mother, sister, brother and half-brothers), with whom

(Plaintiff's Exhibit A)

he was in constant contact. The court said (p. 278): "Under the terms of section 230 and such cases as *Estate of Jessup*, supra, [81 Cal. 408 (6 L. R. A. 594, 21 Pac. 976, 22 Pac. 742, 1028)], and *Blythe v. Ayres*, supra, it must be held that wilful concealment of the fact of paternity by the father from relatives with whom he is in frequent intercourse and is on terms of affection is opposed to public acknowledgment of paternity." The *Baird* case certainly has no application to the facts disclosed by the record herein. Flood, a married man, maintained a family, consisting of his wife and petitioner, and to this family and to persons who visited and associated with it, he declared the relationship. On the other hand, there is no evidence in the record that Flood's mother or sister visited his home during that period, or that he maintained any close contact with them. The evidence of public acknowledgment falls well within the rules laid down in *Estate of Baird*, supra, and other cases decided by this court. (See *Estate of Gird*, supra; *Estate of Jones*, 166 Cal. 112 [135 Pac. 288]; *Estate of Jessup*, 81 Cal. 408 [21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594].)

From the foregoing brief review, we have concluded that there was competent evidence of sufficient substantiality, in support of the elements of legitimation, to necessitate the submission of the case to the jury. We have, in the course of this review, dealt with those contentions of respondents which bear directly upon the admissibility and probative value of petitioner's evidence. The remaining points of respondents represent an attempt to destroy petitioner's case by argument based on conflicting evidence, and on the absence of direct evidence on

(Plaintiff's Exhibit A)

certain matters. Parenthetically, it may be said that the principal witnesses for respondents (Eudora Forde Willette, Alfredeta Forde, Walter Fritz and Mrs. Maud Flood) were contradicted in the essential portions of their testimony by evidence of prior inconsistent statements and other contrary evidence, which fact disposes of respondents' contention that the material parts of their case should be considered on this appeal because they are undisputed and not in conflict with petitioner's case. It would greatly and unnecessarily prolong this opinion to give any extended consideration to the lengthy arguments of respondents on these points, but some may be mentioned by way of illustration. Thus, it is said that petitioner offered no direct evidence that Flood ever knew her mother at any time during his life; that she offered no evidence to show that Flood was at any place which would make it possible for him to be her father; that she offered no evidence to show the circumstances under which she was brought to Flood's home, etc. The mere statement of these propositions discloses their weakness, for it is obvious that there is no requirement that petitioner produce direct evidence upon any of these points. From the declarations and conduct discussed above, all of the elements of paternity and legitimation can be inferred, and whether the inference should be made is a question for the jury. With respect to the impossibility of Flood being the father of petitioner, counsel lean heavily upon the testimony of Mrs. Maud Flood and Walter Fritz, to the effect that Flood had been in the east and did not return to California in time to be present at the date of probable conception. An examination of the record shows that the discrepancy, based upon the normal period of gestation (280 days), was not more than

(Plaintiff's Exhibit A)

ten or fifteen days, and that these witnesses were uncertain in their recollection of the dates, basing their statements partly upon memory and partly upon Flood's habits of travel. The result of their testimony in any event was merely another conflict.

We now come to a consideration of the other evidence offered by petitioner and excluded by the court. In view of our conclusion already expressed that sufficient evidence was produced and admitted to require submission of the case to the jury, the admissibility of this remaining evidence is only important in the event that this case is tried anew. This evidence consisted of declarations of relatives of Mrs. Flood, namely, Mrs. Nancy Fritz, her mother, Beaumont Fritz, her brother, and Wilhelmina Fritz, her sister, all of whom were either dead or outside the state at the time of this trial. A written offer of proof was made by petitioner, and it was stipulated that a number of witnesses would testify that these parties had all declared upon various occasions that Constance was the daughter of James Flood, but not of Rose Flood, and that the mother of petitioner was a woman named Stearn; and that Petitioner's parentage was a frequent subject of discussion in the Fritz family. A similar offer was made as to the declarations of Walter Fritz made in the presence of other members of the family. To these offers of proof respondents objected, and the court ruled that the testimony was inadmissible. This ruling, in our opinion, was erroneous. The theory of respondents is that pedigree declarations of Flood were admissible as to the relationship of petitioner to him; and that declarations of his blood relations, or of his wife were likewise admissible; but that declarations of his

(Plaintiff's Exhibit A)

wife's relatives were incompetent. *Blackburn v. Crawford*, 70 U. S. (3 Wall.) 175 [18 L. Ed. 186], is cited to the point, and it does apparently support this narrow rule; and there is language also in *Shrewsbury Peerage Case*, 7 H. L. D. 1, 11 Eng. Rep. 1, to the same effect. There is no unanimity in the authorities, however, and the view of those cases is not a necessary conclusion from our statute. Section 1870, subdivision 4, makes the pedigree declaration admissible where the deceased declarant was related "by blood or marriage" to the person with whom the declaration deals; and section 1852 makes admissible the declaration of a "member of the family" as evidence of "common reputation" in pedigree cases. There are two theories to justify the admission of these declarations under such statutory provisions. One is that the blood relatives of Mrs. Flood were related to and were members of the family of Mr. Flood, connected by marriage instead of by blood; and that the declarations of such relatives as to his family history were admissible. The other is that petitioner who lived for a time in the household of Mrs. Fritz, was a member of her family in the broad sense of that term, and the declarations of other members of that family as to petitioner's family history were admissible, as evidence of common reputation in that family. (See *Estate of Heaton*, 135 Cal. 388 [67 Pac. 321]; *Alston v. Alston*, 114 Iowa, 29 [86 N. W. 55].) We are disposed to give a liberal interpretation to our statutes, and there is authority to support the view which we take. In *People v. Fulton Fire Ins. Co.*, 25 Wend. (N. Y.) 205, the court states that "it is the common practice to receive evidence of the declarations of persons connected with the family by marriage as well as those who were connected with it by . . .

(Plaintiff's Exhibit A)

consanguinity". In *Alston v. Alston*, supra [86 N. W. 55, 57], the court admitted declarations of parties not actually related to the alleged father, saying: "With reference to the declarations of Mr. and Mrs. De France, they do not come strictly within the rule requiring such declarations to be by a relative by blood or marriage, but it was their family in which plaintiff was brought up and we hold that their declarations are admissible by reason of such relationship." In *Estate of Williams*, 128 Cal. 552, 555 [61 Pac. 670, 672, 79 Am. St. Rep. 67], this court said: ". . . the declarations of William Frederick Williams, deceased, as to the family understanding and belief, to the effect that he (George Williams) enlisted in the army, when a boy, . . . and was believed to have been killed, and that he never married, was competent evidence and sufficient to sustain the finding of the court." Professor Wigmore, whose authoritative treatise on evidence is frequently cited by the courts of this state, condemns the doctrine of *Blackburn v. Crawford*, supra, and in criticising the distinction drawn by such cases, between relationship by blood and relationship by marriage, states: "All that can be said for such a distinction is that relations by marriage are likely to be less intimate in the family circle and to have little or no interest depending upon a chance of inheritance. But the general likelihood of their being correctly informed is perhaps quite as great as for distant consanguineous relations, and is sufficient in the ordinary instances . . . Furthermore, in general, the declaration of any person connected on one side of a marriage concerning relationship in the family on the other side would probably be received, unless the actual absence of adequate information should be made to appear in a

(Plaintiff's Exhibit A)

given instance." (3 Wigmore, Evidence (2d ed., p. 226.) In 1 Greenleaf on Evidence, sixteenth edition, section 114c, page 198, it is said that "the declarations of any person connected by marriage only would probably be received, if he appeared to have had opportunities of information". And in 3 Jones, Commentaries on Evidence, second edition, section 1132, page 2081, a similar statement is made: "The declarations of persons connected by marriage are received, since they are more likely to be informed of the family of which they have become members than a relative who is only distantly connected by blood." It may be added that the facts of the instant cases are extraordinarily appropriate for the application of this rule, since it appears without contradiction that the members of the Flood and Fritz families were very intimately associated, that Mrs. Fritz and her children made lengthy visits at the Flood home, and that Flood made similar visits to the Fritz home at Kansas City.

The possibility of a new trial makes it necessary also to pass upon a ruling of the court which petitioner assigns as error, limiting cross-examination of one of respondents' witnesses. The witness, Mrs. Bertha Welfare, sister-in-law of Senator Bulla, testified on direct examination that she knew petitioner prior to her marriage only under the name of "Constance May Stearn" and that all the expenses of maintaining petitioner after she left the convent were met by Senator Bulla and the witness. Petitioner sought to cross-examine the witness to show first, that Flood had paid for the maintenance of petitioner, and second, that the witness knew petitioner as "Constance May Flood". She was asked, among other questions, the following: "Did you ever

(Plaintiff's Exhibit A)

know Constance by any other name, or did you ever hear any other name mentioned?" "Isn't it a fact, Mrs. Welfare, that in 1920, before Constance was married to Mr. Gavin, that Mr. Gavin, in asking you about Constance's parentage in your home, there being no other person present, said to you, 'Do you know anything about Constance's parentage?' to which you replied, 'Flood—James L. Flood, is her father; I don't know who her mother was . . .'" The court sustained objections to all of this line of questioning, stating that the questions would be permitted only if counsel for petitioner would call Mrs. Welfare as their witness. We are at a loss to understand how this obviously proper impeachment could be restricted in this manner, and in view of the wide latitude habitually permitted by our courts in cross-examination (see *Jackson v. Feather River Water Co.*, 14 Cal. 18, 23), and the willingness of the court below to admit the evidence if the witness were recalled by petitioner, the ruling must be deemed erroneous.

The judgment is reversed.

Curtis, J., Waste, C. J., Thompson, J., Seawell, J., Shenk, J., Preston, J., concurred.

Supreme Court of California

CERTIFICATE

In the Matter of the Estate of James L. Flood, Deceased.

Petition of Constance May Gavin for Partial Distribution.

Constance May Gavin, Appellant, v. The Protestant Episcopal Bishop of California (a corporation Sole), et al., Respondents. S. F. No. 14581

(Plaintiff's Exhibit A)

I, A. V. Haskell, Clerk of the Supreme Court, State of California, do hereby certify that the preceding and annexed is a true and correct copy of the opinion in the above entitled appeal, as shown by the records of my office.

Witness my hand and the seal of the Court this 14th day of June, A. D. 1945.

(Seal)

A. V. HASKELL

Clerk of the Supreme Court of the
State of California.

I hereby certify that the foregoing certificate of the Clerk of the Supreme Court of the State of California is in due form and that the signature attached thereto is the true signature of the Clerk of said Court.

PHIL S. GIBSON

Chief Justice of California.

I, A. V. Haskell, Clerk of the Supreme Court of the State of California, hereby certify that Phil S. Gibson is upon the date hereof the Chief Justice of California and that the signature to the above certificate is the true signature of said Phil S. Gibson.

Witness the seal of said Court at San Francisco, California, this 14th day of June, A. D. 1945.

(Seal)

A. V. HASKELL

Clerk of the Supreme Court of the
State of California.

[Endorsed]: No. 4139-BH. Gavin vs. USA. Plfs. Exhibit A. Filed Jul. 31, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[PLAINTIFF'S EXHIBIT B]

This Agreement made by Constance May Gavin, wife of John P. Gavin, the first party, with Maud Lee Flood, as Trustee under the Trusts created by paragraph "Third" of the Will of James L. Flood, deceased, on file and of record in the office of the Clerk of the Superior Court for San Mateo County, California, and Maud Lee Flood, individually, Mary Emma Flood Stebbins, wife of Theodore E. Stebbins, and James Flood, second parties,

WITNESSETH:

1. James L. Flood, the decedent above named, died testate in the County of San Mateo, State of California, on February 15, 1926;

2. By an order of the Superior Court of the State of California, in and for the County of San Mateo, duly made and entered on March 11, 1926, (a) the last will of said decedent, duly executed by him on November 16, 1920, was admitted to probate as the last will of said decedent, (b) James E. Walsh and Maud Lee Flood named in said will as executors thereof, were duly appointed executors thereof, and (c) letters testamentary ordered issued to them.

Said letters testamentary were duly issued to said executors on the last mentioned date, and continuously thereafter until April 15, 1932 (upon which date said James E. Walsh died) they continued to be the duly appointed, qualified and acting executors of said will of said decedent; and continuously since the death of said James E. Walsh on April 15, 1932, as aforesaid, said Maud Lee Flood has been and now is the duly appointed, qualified and acting sole executor of said will of said decedent;

(Plaintiff's Exhibit B)

3. A true copy of the will of said decedent, James L. Flood, so admitted to probate, is attached hereto, marked Exhibit A, and made a part hereof;

4. Said James L. Flood left him surviving his widow, Maud Lee Flood, and two children and no others, namely, a son, James Flood, and a daughter, Mary Emma Flood (now Stebbins). Said James L. Flood left no descendants him surviving except his said son and his said daughter. Said James L. Flood did not leave him surviving any other child by blood, adoption or otherwise, but left as his only heirs at law his said widow, Maud Lee Flood and his said two children above named, his daughter, Mary Emma Flood (now Stebbins) and his son, James Flood;

5. Said Mary Emma Flood Stebbins and Theodore E. Stebbins, intermarried in the City of New York on October 18, 1930, and they ever since have been and now are husband and wife. One child, and no more, has been born to them, James Flood Stebbins, whose birth took place on the 26th day of July, 1931. There is no descendant of the said James L. Flood now living except the said Mary Emma Flood Stebbins, the said James Flood, and the said James Flood Stebbins;

6. At the time of his death the said James L. Flood was owner of 39,795 shares of the capital stock of the Flood Realty Company, a corporation. By Paragraph "Third" of his will (as will be seen by reference to Exhibit A attached hereto) said James L. Flood gave and bequeathed all shares of the capital stock of said Flood Realty Company, a corporation, which he owned at the time of his death, in trust for the purposes set out in said Paragraph "Third";

(Plaintiff's Exhibit B)

7. The estate of said James L. Flood is still in course of administration in the Superior Court for San Mateo County, California;

8. On March 15, 1927, the first party, Constance May Gavin, filed in the said Superior Court for San Mateo County an application and/or petition for partial distribution to her of a portion of said estate, claiming to be the illegitimate daughter of James L. Flood, and a pretermitted heir at law, and as such entitled to two-ninths of his estate. Said proceeding continued pending in the Superior Court for the County of San Mateo until the 7th day of August, 1931, on which day a judgment was entered that she was not the daughter of James L. Flood, whereupon an appeal was taken to the Supreme Court of California, which on the 18th day of April, 1933, reversed said Judgment and ordered the cause remanded to the Superior Court for San Mateo County for a new trial. A remittitur from said Supreme Court following said judgment was filed in the Superior Court of San Mateo County on the 20th day of May, 1933;

Since said last named day the said application and/or petition of the first party, Constance May Gavin, for partial distribution has continued and is now pending in the Superior Court for San Mateo County.

Said application and/or petition of the first party, Constance May Gavin, is at issue upon the issues raised by (a) her Second Amended Petition for Partial Distribution filed herein May 25, 1931; and (b) the Answer thereto filed herein May 25, 1931, by the following legatees and devisees under the will of said decedent, James L. Flood, and the following beneficiaries of legacies and devises in trust created in and by said will, to wit: (a) The Roman

(Plaintiff's Exhibit B)

Catholic Archbishop of San Francisco, a corporation sole; (b) The Protestant Episcopal Bishop of California, a corporation sole; (c) the St. Vincent's Roman Catholic Orphan Asylum of San Francisco for boys, a corporation; (d) San Francisco Protestant Orphanage Society, a corporation; (e) Roman Catholic Orphan Asylum of San Francisco, a corporation; (f) Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation; (g) Pacific Hebrew Orphan Asylum and Home Society, a corporation; (h) Maud Lee Flood and James E. Walsh, as trustees of the trusts set forth in Paragraph Third of the will of the above named decedent; (i) Maud Lee Flood and James E. Walsh, as Trustees of the trusts set forth in Paragraph Fifth of the will of said decedent; (j) Maud Lee Flood; (k) Mary Emma Stebbins, formerly Mary Emma Flood, who on October 18, 1930 became and now is the wife of Theodore Ellis Stebbins; (l) James Flood; (m) The Regents of the University of California, a corporation; and (n) James E. Walsh, as Executor of the Will of Cora Jane Flood, deceased. (Those by whom said Answer was filed are or may be hereinafter for convenience sometimes called the respondents.)

9. None of the parties of the second part, nor any of the beneficiaries of the trust created by Paragraph Third of the Will of said decedent, nor any of the legatees or devisees named in or taking under the will of said deceased, nor any of the respondents named above, recognizes or has ever recognized the validity of the claim thus put forward by the first party, and all of them have heretofore continuously denied and now deny that she is the daughter of the said James L. Flood, deceased.

(Plaintiff's Exhibit B)

10. Nevertheless the second parties do not desire to carry on the litigation and have arranged a compromise thereof with the first party whereunder the second parties will transfer, assign and set over to the said first party and her transferees and assigns certain interests to which the second parties are entitled under the will of said deceased as follows:

- (a) The said Maud Lee Flood, as trustee of the trusts created by Paragraph Third of the will, is to set over and transfer to the said first party, and/or her assigns, 5896 shares of the capital stock of the Flood Realty Company, a corporation organized under the laws of the State of California.
- (b) Said Maud Lee Flood, Mary Emma Flood Stebins, and James Flood, are to set over and assign to said first party, and/or her assigns,
- (1) The following shares of stock in corporations organized under the laws of the State of California:
 - 37 shares of the preferred stock, \$50. par, of California Pacific Title and Trust Company, a corporation;
 - 57 shares of the common stock of California Pacific Title and Trust Company, a corporation;
 - 4 shares of the capital stock of Merchants Exchange, Inc., a corporation;
 - 8 shares of Morris Plan Company of San Francisco, a corporation;
 - 607 shares of the first preferred stock of Pacific Gas and Electric Company, a corporation, of \$25. Par;

(Plaintiff's Exhibit B)

- 111 shares of the San Francisco Remedial Loan Association, a corporation.
- (2) An undivided interest in the real property owned by the decedent in Mendocino and Marin Counties, as shown by the description thereof in the Inventory and Appraisement, less portions and/or interests in Marin County which have been sold and disposed of during administration.
 - (3) Cash: An undivided 4/27ths of any unexpended balance which may be received by them from the estate, after all charges and expenses have been paid, which 4/27ths is estimated to amount to between \$5,000. and \$7,500.

In addition, the following legatees have abated a portion of the legacies given to them in the will (and interest), and as a result of said abatement \$20,000. is to be paid to said first party which comes from:

- (a) The Roman Catholic Archbishop of San Francisco, a corporation sole;
- (b) The Protestant Episcopal Bishop of California, a corporation sole;
- (c) The St. Vincent's Roman Catholic Orphan Asylum of San Francisco for boys, a corporation;
- (d) San Francisco Protestant Orphanage Society, a corporation;
- (e) Roman Catholic Orphan Asylum of San Francisco, a corporation;
- (f) Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation, and
- (g) Pacific Hebrew Orphan Asylum and Home Society, a corporation.

(Plaintiff's Exhibit B)

In addition to the foregoing, said Maud Lee Flood, Mary Emma Flood Stebbins, and James Flood are to pay to said first party and/or her assigns, the sum of \$100,000. out of their own funds and not distributable out of the estate of said deceased, and are to make and agreement contemporaneously with the delivery by the first party of this agreement in respect of property belonging to the said estate not now known or discovered but which may later become known or discovered.

Now, Therefore, the first party, in consideration of the premises and of the payments and transfers aforesaid, does hereby

(1) Acknowledge receipt of the payments of the aforesaid sums of money and transfer to her, and/or her assigns, of the property above listed; and the writing dealing with property belonging to the estate not now known or discovered, which is mentioned above.

(2) Promise, covenant and agree with the said second parties, and each of them, their devisees, legatees, successors in interest in estate and assigns, that she, the first party, Constance May Gavin, will never hereafter assert that she is the daughter of James L. Flood, nor claim any right, title or interest in or to his estate, or any part thereof, as an heir at law or child of said James L. Flood, nor ever assert any right, title or interest in any property derived by the second parties, or any of them, their successors, heirs, legatees or assigns, by, through or under the will of James L. Flood, deceased,

(Plaintiff's Exhibit B)

except such property as she has received or may receive by transfer from the second parties as hereinabove stated, (or under the above mentioned agreement relating to property belonging to the said estate not now known or discovered) whether said property consists of the identical property derived by said second parties, or any of them, from the estate of said James L. Flood, deceased, or from rents, issues or profits thereof, or by the sale of any part of the same, and/or the reinvestment of the proceeds of such sale.

(3) Further covenant that she, the first party, Constance May Gavin, will not at any time assert or claim any relationship whatever to the second parties, or any of them, or make any claim against any person whomsoever, whether such person be one of the parties of the second part or the descendants of any of them, or otherwise related to them, (and whether such persons be now or later born) by reason of or based upon the claim or an assertion that she, the first party, Constance May Gavin, was the daughter of James L. Flood, or that she had any right of inheritance in the estates of any of the second parties, or of any other person or persons whomsoever now living or hereafter to be born upon the grown or predicated upon the assertion that she is or was the daughter of James L. Flood.

(4) Agree for herself and for her heirs, successors in interest, and assigns, to warrant and defend the title of the property of the second parties, their heirs, devisees, legatees, successors and assigns against all claim to said property or any thereof, or any part or parcel thereof, to be made by her, or by any person claiming under her,

(Plaintiff's Exhibit B)

and the first party agrees on her own behalf and on behalf of her heirs, successors in interest, legatees and *and* devises, that neither she nor any of them, shall or will in any manner, or to any extent, set up or claim any right to participate or take part in the administration of the estate or estates of any person or persons whomsoever now or hereafter born based upon the claim or assertion that she is or was the daughter of James L. Flood.

In Witness Whereof, the first party has hereunto set her hand at the City and County of San Francisco, State of California, this 28th day of February, 1934.

CONSTANCE MAY GAVIN.

State of California, County of San Mateo—ss.

I, T. C. Rice, County Recorder in and for the County of San Mateo, State of California, do hereby certify the annexed to be a full, true and correct excerpt copied from the record of Agreement made by Constance May Gavin to Maud Lee Flood, as Trustee as the same appears of record in Vol. 619 of Official Records at page 104, records of said county.

In Witness Whereof, I have hereunto set my hand and seal of office, this 28th day of July, A. D. 1945.

(Seal)

T. C. RICE

County Recorder

Deputy Recorder

[Endorsed]: No. 4139-BH. Gavin vs. USA. Plfs. Exhibit B. Filed Jul. 31, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[PLAINTIFF'S EXHIBIT C]

Minute Book 61 Page 13

In the Superior Court of the State of California, in and
for the County of San Mateo.

February 28, 1934

Present, Hon. William F. James, Judge.

In the Matter of the Estate of James L. Flood, Deceased. No. 3829.

The trial and hearing on the petition for partial distribution of the estate of the above named deceased and hearing on the settlement of the second, third, fourth and final account _and petition for final distribution of said estate came regularly on this day, Garret W. McEnerney, Esq., Theo J. Roche, Esq., Andrew F. Burke, Esq., Messrs. Barrett & Calkins, Messrs. Ross & Ross and Messrs. Murphy, Zook, Slack and Oliver Dibble, Esq., appearing for the executor and certain heirs and devisees, and John J. Taaffe, Esq., and Albert Mansfield, Esq., appearing for Constance May Gavin. W. H. Girvin, Court Reporter, present.

Theo J. Roche, Esq., made his statement to the court on behalf of the respondents on the petition of Constance May Gavin for partial distribution of the estate of the above named deceased and documentary evidence was introduced and marked Respondents' Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and the evidence being closed, said matter was submitted to the court for consideration and decision, and now the court having considered the same and being fully advised herein,

(Plaintiff's Exhibit C)

It is ordered that the petition of Constance May Gavin for partial distribution of said estate be and the same is hereby denied.

Darrell W. Daly was called, sworn and examined as a witness on the part of the executor and documentary evidence was introduced, and the evidence being closed, said matter was submitted to the court for consideration and decision, and now the court having considered the same and being fully advised herein,

It is ordered that the second, third, and fourth and final accounts of executor be and the same are hereby settled and allowed as presented and final distribution of estate is hereby made as prayed for.

State of California, County of San Mateo—ss.

I, W. H. Augustus, County Clerk of the above entitled County, and ex-officio Clerk of the Superior Court thereof, do hereby certify that the foregoing is a full, true and correct copy of the original on file in my office, and that I have carefully compared the same with the original.

Witness my hand and seal of said Superior Court this 18th day of July, 1945.

(Seal)

W. H. AUGUSTUS

County Clerk and Ex-Officio Clerk, Superior Court

By June M. Lynch

Deputy Clerk

(Plaintiff's Exhibit C)

In the Superior Court of the State of California, in and
For the County of San Mateo

In the Matter of the Estate of James L. Flood, Deceased.

Petition of Constance May Gavin for Partial Distribution, Filed March 15, 1927; superseded by her Amended Petition for Partial Distribution filed December 7, 1927, and the latter superseded by her Second Amended Petition for Partial Distribution filed May 25, 1931. No. 3829, Probate

DECISION: FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

The above mentioned petition of Contance May Gavin for partial distribution (hereinafter for convenience sometimes called the petitioner) in the above entitled estate came on this day to be tried upon the issues raised by (a) her Second Amended Petition for Partial Distribution filed herein May 25, 1931; and (b) the Answer thereto filed herein May 25, 1931, by the following legatees and devisees under the will of the above named decedent named therein and the following beneficiaries of legacies and devises in trust created in and by said will, to-wit: (a) The Roman Catholic Archbishop of San Francisco, a corporation sole; (b) The Protestant Episcopal Bishop of California, a corporation sole; (c) The St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation; (d) San Francisco Protestant Orphanage Society, a corporation; (e) Roman Catholic Orphan Asylum of San Francisco, a corporation; (f) Maria Kip Orphanage and Al-Fred Nuttall Nelson Memorial Home, a corporation; (g) Pacific Hebrew Orphan Asy-

(Plaintiff's Exhibit C)

lum and Home Society, a corporation; (h) Maud Lee Flood and James E. Walsh, as Trustees of the trusts set forth in Paragraph Third of the will of the above named decedent on file herein; (i) Maud Lee Flood and James E. Walsh, as Trustees of the trusts set forth in Paragraph Fifth of the will of said decedent on file herein; (j) Maud Lee Flood; (k) Mary Emma Stebbins, formerly Mary Emma Flood, who on October 18, 1930 became and now is the wife of Theodore Ellis Stebbins; (l) James Flood; (m) The Regents of the University of California, a corporation; and (n) James E. Walsh, as Executor of the will of Cora Jane Flood, deceased. (Those by whom said Answer was filed are hereinafter for convenience sometimes called the respondents.)

Evidence was offered and received in respect of and relevant to the issues created by said second amended petition and the answer thereto, and thereupon the said second amended petition for partial distribution was submitted to the court for decision.

The court now renders and files its decision herein and finds the facts to be as follows:

FINDINGS OF FACT.

(1) The petitioner, Constance May Gavin, was born at 626 Eddy Street in San Francisco on May 11, 1893; Eudora Helen Forde Willette (then Ford or Forde) is her mother; James L. Flood was not and is not the father of said petitioner, Constance May Gavin; said Eudora Helen Forde Willette (then Ford or Forde) was not married on May 11, 1893 nor theretofore, and that the petitioner, Constance May Gavin, was illegitimate born. Said petitioner was baptized at 626 Eddy Street,

(Plaintiff's Exhibit C)

San Francisco, on May 19, 1893, by Edward J. Doran, a Priest of the Roman Catholic Church, at that time an Assistant Rector at St. Mary's Cathedral, Van Ness Avenue and O'Farrell Street, San Francisco.

The Record of said baptism reads as follows:

“Record of Baptism.

St. Marys Cathedral

May 19th 1893

Constans Marguerite Stern

Born 11th May 1893

(Victor Stern

Par. (

(Eudora Ford

Privatim

Matrina Alfredita Ford

Edward J. Doran

Asst.”

The meanings of the words in said Record of Baptism, “Par.”; “Matrina”, “Privatim”, are as follows:

Par.—Parentes—Parents;

Matrina—Godmother;

Privatim—Private—Not at Church.

Alfredita Ford, named as the god mother of petitioner in the foregoing Record of Baptism, is the mother of Eudora Helen Forde Willette (then Ford or Forde). Said Alfredita Ford and said Eudora Helen Forde (or Ford) Willette are still living, and they now reside at 535-41st Street, Oakland, California.

(2) James L. Flood and Maud Lee Fritz intermarried at Kansas City, Missouri, on February 8, 1899, and they

(Plaintiff's Exhibit C)

ever thereafter remained husband and wife until the death of said James L. Flood, which occurred February 15, 1926; Mary Emma Flood was born of said marriage at San Francisco July 7, 1900, and is a legatee and devisee under the will of her said father; on October 18th, 1930 said Mary Emma Flood intermarried with Theodore Ellis Stebbins, and has ever since been, and now is, his wife; James Flood was born of said marriage of James L. Flood and Maud Lee Fritz, at San Francisco, July 13, 1908, and is a legatee and devisee in and under the will of his said father; Cora Jane Flood, sister of the decedent James L. Flood, died November 1, 1928, and by Decree of Final Distribution in her estate entered in the Superior Court of San Mateo County, California, on June 19, 1930 her entire estate was distributed to her niece, Mary Emma Flood Stebbins, and her nephew, James Flood; James E. Walsh became on November 30, 1928 the duly qualified and acting executor of the will of said Cora Jane Flood, deceased, and continued to act as such, never having been discharged, down to the date of his death, which occurred April 15, 1932.

One child, a son, named James Flood Stebbins, has been born of the marriage of said Theodore Ellis Stebbins and Mary Emma Flood as aforesaid, and no other child. Said James Flood Stebbins was born July 26, 1931.

Said James Flood, son of James L. Flood, never has been married.

The only living descendants of said James L. Flood are his daughter, the said Mary Emma Flood Stebbins, his son, the said James Flood, and his grandson, the said James Flood Stebbins, born of the marriage of Theodore Ellis Stebbins and Mary Emma Flood, as aforesaid.

(Plaintiff's Exhibit C)

CONCLUSIONS OF LAW.

And as its Conclusions of Law from the foregoing facts, the court adjudges that respondents (except James E. Walsh, who died April 15, 1932) are entitled to a judgment herein (a) that petitioner, Constance May Gavin is not the daughter, nor a child, nor an heir at law of the decedent, James L. Flood; (b) that petitioner did not succeed to any part or portion of his estate; (c) that the petitioner take nothing by her said Second Amended Petition nor her application for partial distribution; and (d) that the said respondents (other than James E. Walsh, who died April 15, 1932) have a judgment against the petitioner Constance May Gavin for their costs herein incurred taxed at \$1.00.

Let Judgment be entered accordingly.

Dated: February 28th, 1934.

WM. F. JAMES

Judge of the Superior Court.

State of California, County of San Mateo—ss.

I, W. H. Augustus, County Clerk of the above entitled County, and ex-officio Clerk of the Superior Court thereof, do hereby certify that the foregoing is a full, true and correct copy of the original on file in my office, and that I have carefully compared the same with the original.

Witness my hand and seal of said Superior Court this 18th day of July, 1945.

(Seal)

W. H. AUGUSTUS

County Clerk and Ex-Officio Clerk, Superior Court

By June M. Lynch

Deputy Clerk

[Endorsed]: Filed Feb. 28, 1934. E. B. Hinman,
Clerk, by H. A. Hargrave, Deputy Clerk.

(Plaintiff's Exhibit C)

In the Superior Court of the State of California, in and
for the County of San Mateo.

In the Matter of the Estate of James L. Flood, Deceased.

Petition of Constance May Gavin for Partial Distribution, Filed March 15, 1927; superseded by her Amended Petition for Partial Distribution filed December 7, 1927, and the latter superseded by her Second Amended Petition for Partial Distribution filed May 25, 1931. No. 3829, Probate

JUDGMENT

The above mentioned petition of Constance May Gavin for partial distribution (hereinafter for convenience sometimes called the petitioner) in the above entitled estate came on this day to be tried upon the issues raised by (a) her Second Amended Petition for Partial Distribution filed herein May 25, 1931; and (b) the Answer thereto filed herein May 25, 1931, by the following legatees and devisees under the will of the above named decedent named therein and the following beneficiaries of legacies and devises in trust created in and by said will, to wit: (a) The Roman Catholic Archbishop of San Francisco, a corporation sole; (b) The Protestant Episcopal Bishop of California, a corporation sole; (c) The St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation; (d) San Francisco Protestant Orphanage Society, a corporation; (e) Roman Catholic Orphan Asylum of San Francisco, a corporation; (f) Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation; (g) Pacific Hebrew Orphan Asylum and Home Society, a corporation; (h)

(Plaintiff's Exhibit C)

Maud Lee Flood and James E. Walsh as Trustees of the trusts set forth in Paragraph Third of the will of the above named decedent on file herein; (i) Maud Lee Flood and James E. Walsh, as Trustees of the trusts set forth in Paragraph Fifth of the will of said decedent on file herein; (j) Maud Lee Flood; (k) Mary Emma Stebfins, formerly Mary Emma Flood, who on October 18, 1930 became and now is the wife of Theodore Ellis Stebbins; (l) James Flood; (m) The Regents of the University of California, a corporation; and (n) James E. Walsh, as Executor of the will of Cora Jane Flood, deceased. (Those by whom said Answer was filed are hereinafter for convenience sometimes called the respondents.)

Thereupon the court tried said proceeding and the same was submitted to the court for decision, after which the court rendered and filed its decision in writing herein, pursuant whereto

It Is Hereby Ordered, Adjudged and Decreed as follows:

(1) Petitioner, Contance May Gavin, is not the daughter, nor a child, nor an heir at law of the decedent, James L. Flood;

(2) Petitioner, Constance May Gavin, did not succeed to any part or portion of the estate of James L. Flood, deceased.

(3) Petitioner, Constance May Gavin, take nothing by her Second Amended Petition nor by her application for partial distribution.

(4) Respondents (other than James E. Walsh, who died April 15, 1932) have a judgment against petitioner,

(Plaintiff's Exhibit C)

Constance May Gavin, for their costs herein incurred taxed at \$1.00.

Let this Judgment be entered accordingly.

Dated: February 28th, 1934.

(Signed) WM. F. JAMES

Judge of the Superior Court.

[Endorsed]: Filed 2/28/34. E. B. Hinman, Clerk.

[Endorsed]: No. 4139-BH. Gavin vs. USA. Plfs. Exhibit C. Filed Jul. 31, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

[PLAINTIFF'S EXHIBIT D]

In the Superior Court of the State of California in and
for the County of San Mateo

In the Matter of the Estate of James L. Flood, Deceased. No. 3829, Probate

DECREE OF FINAL DISTRIBUTION

Maud Lee Flood as Executor of the Will of James L. Flood, deceased (her co-executor, James E. Walsh, having died on April 15, 1932) having heretofore, to wit, on December 22, 1933, filed herein her Second Account, and having thereafter and on December 28, 1933 filed herein her Third Account, and having thereafter and on February 8, 1934, filed herein her Fourth and Final Account and Report of her administration of the estate of said deceased, with a Petition for the allowance and settlement of said Second Account and said Third Account and said Fourth and Final Account, and a petition for the Final

(Plaintiff's Exhibit D)

Distribution of said estate, and said executor having on the date of this decree filed herein her Supplemental Final Account; and said Second Account and said Third Account and said Fourth and Final Account and Report and said petition for the settlement and allowance of

-1-

[Seal Superior Court, County of San Mateo, California]

Garret W. McEnerney,
Attorney for Executor,
2002 Hobart Bldg.,
San Francisco, California

said accounts and said Supplemental Final Account having come on regularly to be heard by the Court on the date of this decree and having been duly and regularly heard, and the Court having made and filed herein its decree settling said Second Account and said Third Account and said Fourth and Final Account and the said Supplemental Final Account, and the Court having thereupon proceeded to hear and having heard said petition for the final distribution of said estate, and it appearing to the Court and the Court hereby finds that the estate of said deceased is in a condition to be closed and that final distribution may be had herein, and it furthermore appearing to the satisfaction of the Court that notice of the hearing of said petition for the final distribution of said estate had been duly and regularly given to all persons interested in the estate of said decedent and to all persons who had requested notice and/or who had given notice of appearance in said estate in person or by attorney for the time and in the manner prescribed by law, and the Court having heard the evidence upon said appli-

(Plaintiff's Exhibit D)

cation for final distribution, both oral and documentary, and being fully advised in the premises, does hereby find, adjudge and decree that:

1. James L. Flood, the decedent above named, died testate in the County of San Mateo, State of California, on February 15th, 1926;

2. By an order of this Court duly made and entered on March 11, 1926, (a) the last Will of said decedent, duly executed by him on November 16, 1920, was admitted to probate as the last Will of said decedent, (b) James E. Walsh and Maud Lee Flood named in said Will as Executors thereof, were duly appointed executors thereof, and (c) Letters Testamentary ordered issued to them;

Said Letters Testamentary were duly issued to said Executors on the last mentioned date, and continuously thereafter until April 15, 1932 (upon which date said James E. Walsh died) they continued

-2-

[Seal Superior Court, County of San Mateo, California]

to be the duly appointed, qualified and acting executors of said Will of said decedent; and continuously since the death of said James E. Walsh on April 15, 1932, as aforesaid, said Maud Lee Flood has been and now is the duly appointed, qualified and acting sole executor of said Will of said decedent;

(3) Said Will of said decedent James L. Flood, on file with the Clerk of this Court and the recordation thereof in the Minutes of the Court are hereby referred to and made a part hereof;

(Plaintiff's Exhibit D)

(4) Said James L. Flood left him surviving his widow, Maud Lee Flood, and two children, and no others, namely, a son James Flood, and a daughter, Mary Emma Flood (now Stebbins). Said son, James Flood, was born July 13, 1908, and became of age July 13, 1929. Said daughter, Mary Emma Flood (now Stebbins) was born July 7, 1900. Said James L. Flood left no descendants him surviving except his said son and his said daughter. Said James L. Flood did not leave him surviving any other child by blood, adoption or otherwise, but left as his only heirs at law, his said widow, Maud Lee Flood and his said two children above named, his daughter, Mary Emma Flood (now Stebbins) and his son, James Flood. Said James L. Flood was over the age of sixty years at the time of his death. Said Maud Lee Flood, Mary Emma Flood (now Stebbins) and James Flood are still alive;

(5) Said Mary Emma Flood Stebbins and Theodore E. Stebbins intermarried in the City of New York on October 18, 1930, and they ever since have been and now are husband and wife. One child, and no more, has been born to them, James Flood Stebbins, whose birth took place on the 26th day of July, 1931. There is no descendant of the said James L. Flood now living except the said Mary Emma Flood Stebbins, the said James Flood, and the said James Flood Stebbins. Said Mary Emma Flood Stebbins, Theodore E. Stebbins and James Flood Stebbins are still alive;

-3-

[Seal Superior Court, County of San Mateo, California]

(6) On March 15, 1927, Constance May Gavin filed in this Court an application and/or petition for partial distribution to her of a portion of said estate, claiming

(Plaintiff's Exhibit D)

to be the illegitimate daughter of James L. Flood, and a pretermitted heir at law, and as such entitled to 2/9th of his estate. Said proceeding continued pending in this Court until the 7th day of August, 1931 on which day a judgment was entered that she was not the daughter of James L. Flood, whereupon an appeal was taken to the Supreme Court of California, which on the 18th day of April, 1933, reversed said judgment and ordered the cause remanded to this Court for a new trial. A remittitur from said Supreme Court following said judgment was filed in this Court on the 20th day of May, 1933;

Said application and/or petition of Constance May Gavin for partial distribution continued pending in this Court from the 20th day of May, 1933, to this date, when it was tried by the Court without a jury (a jury having been waived) and resulted in the "Decision: Findings of Fact and Conclusions of Law," and also in the "Judgment" which are on file herein and are final. In and by said judgment, among other things, it is ordered, adjudged and decreed as follows:

(a) Petitioner, Constance May Gavin, is not the daughter, nor a child, nor an heir at law of the decedent, James L. Flood;

(b) Petitioner, Constance May Gavin, did not succeed to any part or portion of the estate of James L. Flood, deceased;

(c) Petitioner, Constance May Gavin, take nothing by her second amended petition or by her application for partial distribution;

(7) Paragraph "Second" of the Will of James L. Flood reads as follows:

(Plaintiff's Exhibit D)

“Second: I hereby give and bequeath to the Roman Catholic Archbishop of San Francisco, a corporation, sole, the sum of twenty thousand (\$20,000) dollars, to be divided in amounts to be fixed by it amongst the charitable institutions under its control; to the Protestant Episcopal Bishop of California, a corporation, sole, the sum of twenty thousand (\$20,000) dollars, to be divided in amounts to be fixed by it amongst the charitable institutions under its control; to the St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation, the sum of twenty five thousand (\$25,000) dollars, to San Francisco, Protestant Orphanage Society, a corporation, the sum of twenty five thousand (\$25,000) dollars; to Roman Catholic Orphan Asylum of San Francisco, a corporation, the sum of twenty five thousand (\$25,000) dollars, to Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation, the sum of five thousand (\$5,000) dollars; to Pacific Hebrew Orphan Asylum and Home Society, a corporation, the sum of five thousand (\$5,000) dollars.”

Partial payments have been made to the legatees named in paragraph “Second” and they have abated 4/27ths of the legacies given to them in said paragraph (and interest) so that payment of the sums hereinafter distributed to them will constitute final payment;

(8) In paragraph “Third” of his will, said James L. Flood bequeathed all shares of the capital stock of the Flood Realty Company, a corporation, owned by him at the time of his death, in trust for the uses and purposes as in said paragraph “Third” stated, whereunder the trustees thereof, among other things, were to collect and receive the income from the trust estate during the

(Plaintiff's Exhibit D)

life of the last survivor of the following named four persons, namely, his wife, Maud Lee Flood, his sister, Cora Jane Flood, his

-5-

[Seal Superior Court, County of San Mateo, California]

daughter Mary Emma Flood (now Stebbins) and his son James Flood. In said paragraph "Third" of his said Will, said testator further provided that the said trust should cease and terminate upon the death of the last survivor of said four named persons and that all property then belonging to the trust estate should "upon the death of the said last survivor" go and belong to the issue, if any, of his said son and/or his said daughter; and if neither his said son or his said daughter should have left issue then living, then to "the Regents of the University of California, a corporation," in trust to apply the same to the uses and purposes of the University of California;

The statement in this paragraph and in other portions of this decree respecting the provisions or effect of said Will shall be subject to the terms of the said Will, a copy of which is hereto attached, marked "Exhibit A" and made a part hereof. As elsewhere stated, said Maud Lee Flood, said Mary Emma Flood (now Stebbins) and said James Flood were alive at the death of said James L. Flood, and they are still alive. Cora Jane Flood was alive at the death of her brother James L. Flood, but later died, towit, on November 1, 1928;

(9) In paragraph "Fourth" of his Will, said James L. Flood gave and devised to his wife, Maud Lee Flood, and to his daughter, Mary Emma Flood (now Stebbins)

(Plaintiff's Exhibit D)

each a one third interest in all real property to which he died seized or possessed;

(10) In paragraph "Fifth" of his Will, said James L. Flood gave and devised an undivided one third interest in all real property of which he died seized or possessed unto Maud Lee Flood and James E. Walsh as trustees, upon the trusts and for the uses and purposes therein specified, for the benefit of his said son James Flood during the minority of said James Flood, and further provided that upon said James Flood attaining his majority, the trust

-6-

[Seal Superior Court, County of San Mateo, California]

created by said paragraph "Fifth" should cease and terminate. Said James Flood attained his majority on July 13, 1929, and hence the trust created by the provisions of said paragraph "Fifth" are no longer and can not in the future be operative. On the contrary, by virtue of the terms of paragraph "Fifth" of said Will, one third of all real property of which the decedent died seized or possessed goes directly to his said son, James Flood, inasmuch as he came of age July 13, 1929;

(11) In paragraph "Seventh" of his Will, said James L. Flood gave, devised and bequeathed the rest, residue and remainder of his estate, in equal shares, to his wife, Maud Lee Flood; his daughter, Mary Emma Flood (now Stebbins) and his son, James Flood;

(12) As will appear by the decree of settlement of Second Account and of Third Account and Fourth and Final

(Plaintiff's Exhibit D)

Account and Supplemental Final Account of Executor filed herein this day, there is on hand for distribution the sum of \$56,259.14, and the real and personal property set forth in "Schedule A" attached to said decree, to which reference is hereby made;

(13) Except for the requests for and consents to distribution to others and abatements of legacies made by them, as hereinafter stated, the only persons who would be now entitled to distribution would be the legatees and devisees under the Will of said deceased, and particularly under paragraphs Second, Third, Fourth, Fifth and Seventh thereof;

(14) All inheritance taxes due the State of California, and all personal property taxes due from or payable out of said estate have been fully paid and discharged by the executor;

(15) All claims presented against the estate of said decedent have been paid;

(16) On August 12, 1931, James E. Walsh and Maud Lee Flood

-7-

[Seal Superior Court, County of San Mateo, California]

as trustees of the trust created in paragraph "Third" of the Will of said decedent, sold 4295 shares of the capital stock of the Flood Realty Company, a corporation, to said Flood Realty Company for considerations which have been received and were adequate. Said Maud Lee Flood, as such trustee, consents that 4295 shares of the capital stock of the Flood Realty Company, a corporation, which would otherwise be distributable to her as trustee aforesaid, shall be distributed directly to said Flood Realty

(Plaintiff's Exhibit D)

Company, and requests the court to make distribution accordingly:

(17) Said Maud Lee Flood, as such trustee, consents to the distribution of 5896 shares of the capital stock of the Flood Realty Company which would otherwise be distributable to her as trustee, to the persons and in the number of shares below named, and requests the court to make distribution accordingly:

To Constance May Gavin	2,948 shares Flood Realty Company
To Carmelita Aureguy	1,474 shares Flood Realty Company
To Maxwell McNutt	700 shares Flood Realty Company
To John J. Taaffe, and Tressie G. Taaffe, his wife, as Joint Tenants	700 shares Flood Realty Company
To Albert Mansfield	74 shares Flood Realty Company

5,896

(18) Maud Lee Flood, individually, Mary Emma Flood Stebbins and James Flood, hereby consent to distribution out of property to which they would be otherwise entitled, and request the Court to make distribution as follows:

(a) To Constance May Gavin the following shares of stock in corporations organized and existing under the laws of the State of California:

(Plaintiff's Exhibit D)

1. 37 shares of the preferred stock, \$50.00 par, of California Pacific Title and Trust Company, a corporation;

-8-

[Seal Superior Court, County of San Mateo, California]

2. 57 shares of the common stock of California Pacific Title and Trust Company, a corporation;

3. 4 shares of the capital stock of Merchants Exchange, Inc., a corporation;

4. 8 shares of the Morris Plan Company of San Francisco, a corporation;

5. 607 shares of the first preferred stock of Pacific Gas and Electric Company, a corporation;

6. 111 shares of the San Francisco Remedial Loan Association, a corporation;

(b) To Constance May Gavin the sum of \$20,000.00 out of the legacies given by paragraph "Second" of the Will and the abatement made by the legatees therein named;

(c) To Constance May Gavin an undivided 2/27ths interest in all of the lands situate in the Counties of Mendocino and Marin which are set forth and described in Schedules A and B attached to this decree;

(d) To John J. Taaffe an undivided 2/27ths interest in all of the lands situate in the Counties of Mendocino and Marin which are set forth and described in Schedules A and B attached to this decree;

Now, Therefore, in consideration of the law and the premises, It Is Hereby Further Ordered, Adjudged and Decreed:

(Plaintiff's Exhibit D)

(1) That due and legal notice of the hearing of the petition for final distribution has been given;

(2) That due and legal notice of the creditors of said James L. Flood has been given; that the same is established of record, and that this decree be entered in the Minutes of this Court and recorded;

-9-

[Seal Superior Court, County of San Mateo, California]

(3) That there be and there is hereby awarded, set over and distributed unto the following corporations named in paragraph "Second" of the Will of said deceased the following:

(a) To the Roman Catholic Archbishop of San Francisco, a corporation sole, the sum of one thousand four hundred eighty-one and $47/100$ dollars (\$1,481.47) as final payment on account of the legacy of \$20,000.00 "to be divided in amounts to be fixed by it amongst the charitable institutions under its control," given to said corporation sole in paragraph "Second" of the Will of said decedent;

(b) To the Protestant Episcopal Bishop of California, a corporation sole, the sum of one thousand four hundred eighty one and $47/100$ dollars (\$1,481.47) as final payment on account of the legacy of \$20,000.00 "to be divided in amounts to be fixed by it amongst the charitable institutions under its control," given to said corporation sole in paragraph "Second" of the Will of said decedent;

(c) To the St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation, the sum of one thousand eight hundred fifty one and $82/100$ dol-

(Plaintiff's Exhibit D)

lars (\$1,851.82) as final payment on account of the legacy of \$25,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(d) To San Francisco Protestant Orphanage Society, a corporation, the sum of one thousand eight hundred fifty one and 82/100 dollars (\$1,851.82) as final payment on account of the legacy of \$25,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(e) To the Roman Catholic Orphan Asylum of San Francisco, a corporation, the sum of one thousand eight hundred fifty one and 82/100 (\$1,851.82) dollars, as final payment on account of the legacy

-10-

[Seal Superior Court, County of San Mateo, California]

of \$25,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(f) To Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation, the sum of three hundred seventy and 37/100 dollars (\$370.37) as final payment on account of the legacy of \$5,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(g) To Pacific Hebrew Orphan Asylum and Home Society, a corporation, the sum of three hundred seventy and 37/100 dollars (\$370.37) as final payment on account of the legacy of \$5,000.00 given to said corporation in paragraph "Second" of the Will of said decedent;

(4) That there be and there is hereby awarded, set over and distributed unto Constance May Gavin the sum of Twenty Thousand Dollars (\$20,000.), payable in

(Plaintiff's Exhibit D)

consequence of partial abatement of the legacies of \$125,000.00 bequeathed in paragraph "Second" of the Will of said decedent;

(5) That there be and there is hereby awarded, set over and distributed unto Constance May Gavin the following:

(a) Thirty seven (37) shares of the preferred stock, par of California Pacific Title and Trust Company, a corporation;

(b) Fifty seven (57) shares of the common stock of California Pacific Title and Trust Company, a corporation;

(c) Four (4) shares of the capital stock of Merchants Exchange, Inc., a corporation;

(d) Eight (8) shares of the Morris Plan Company of San Francisco, a corporation;

(e) Six Hundred and Seven (607) shares of the first preferred stock of Pacific Gas and Electric Company, a corporation;

-11-

[Seal Superior Court, County of San Mateo, California]

(f) One Hundred and Eleven (111) shares of the San Francisco Remedial Loan Association, a corporation;

(g) An undivided 2/27ths of the pieces and parcels of land situate in Mendocino County, California, described in "Schedule A" attached to this decree;

(h) An undivided 2/27ths of the pieces and parcels of land situate in Marin County, California, described in "Schedule B" attached to this decree;

(Plaintiff's Exhibit D)

(6) That there is hereby awarded, set over and distributed to John J. Taffe the following:

(a) An undivided 2/27ths of the pieces and parcels of land situate in Mendocino County, California, described in "Schedule A" attached to this decree;

(b) An undivided 2/27ths of the pieces and parcels of land situate in Marin County, California, described in "Schedule B" attached to this decree;

(7) That there be and there is hereby awarded, set over and distributed to Flood Realty Company, 4295 shares of Flood Realty Company as the successors in interest by purchase of the right, title and interest thereto of the trustee or trustees in paragraph "Third" of the Will of said decedent;

(8) That there be and there is hereby awarded, set over and distributed five thousand eight hundred ninety six (5,896) shares of the capital stock of the Flood Realty Company to the persons and in the amounts of shares following:

(a) To Constance May Gavin, two thousand nine hundred forty eight (2,948) shares;

(b) To Carmelita Aureguy, one thousand four hundred seventy four (1,474) shares;

-12-

[Seal Superior Court, County of San Mateo, California]

(c) To Maxwell McNutt, seven hundred (700) shares;

(d) To John J. Taffe and Tressie G. Taaffe, his wife, as Joint Tenants, seven hundred (700) shares;

(e) To Albert Mansfield seventy four (74) shares;

(9) That there be and there is hereby awarded, set over and distributed to Maud Lee Flood, as trustee of the

(Plaintiff's Exhibit D)

trusts specified in paragraph "Third" of the Will of said decedent, twenty nine thousand six hundred and four (29,604) shares of the capital stock of Flood Realty Company, a corporation;

(10) That there be and there is hereby awarded, set over and distributed to Maud Lee Flood, individually; to Mary Emma Flood Stebbins, and to James Flood, and to each of them severally, the following:

(a) Out of the preferred shares, \$50.00 par, of California Pacific Title and Trust Company, a corporation; Maud Lee Flood, seventy three (73) shares; Mary Emma Flood Stebbins, seventy one (71) shares; James Flood, seventy one (71) shares;

(b) Out of common shares of California Pacific Title and Trust Company, a corporation: Maud Lee Flood, one hundred and eleven (111) shares; Mary Emma Flood Stebbins, one hundred and eleven (111) shares; James Flood, one hundred and eleven (111) shares;

(c) Out of shares of Merchants Exchange, Inc.: Maud Lee Flood, ten (10) shares; Mary Emma Flood Stebbins, eight (8) shares; James Flood, eight (8) shares;

(d) Out of shares of the Morris Plan Company of San Francisco, a corporation: Maud Lee Flood, eighteen (18) shares; Mary Emma Flood Stebbins, seventeen (17) shares; James Flood, seventeen (17) shares;

(e) Out of the first preferred shares of Pacific Gas and Electric

-13-

[Seal Superior Court, County of San Mateo, California]

Company, a corporation: Maud Lee Flood, one thousand one hundred sixty five (1,165) shares; Mary Emma Flood Stebbins, one thousand one hundred sixty four (1,164)

(Plaintiff's Exhibit D)

shares; James Flood, one thousand one hundred sixty four (1,164) shares;

(f) Out of shares of the Rancho Santa Margarita, a corporation: Maud Lee Flood, two thousand nine hundred sixteen (2,916) shares; Mary Emma Flood Stebbins, two thousand nine hundred seventeen (2,917) shares; James Flood, two thousand nine hundred seventeen (2,917) shares;

(g) Out of shares of San Francisco Remedial Loan Association, a corporation: Maud Lee Flood, two hundred thirteen (213) shares; Mary Emma Flood Stebbins, two hundred thirteen (213) shares; James Flood, two hundred thirteen (213) shares;

(11) That there be and there is hereby awarded, set over and distributed to Maud Lee Flood, individually; to Mary Emma Flood Stebbins, and to James Flood, and to each of them severally, an undivided interest equal to twenty three eighty firsts (23/81sts) of all of the real property in Mendocino and Marin Counties, described in Schedules A and B attached to this decree;

(12) That there be and there is hereby awarded, set over and distributed to Maud Lee Flood, individually; to Mary Emma Flood Stebbins, and to James Flood, and to each of them severally, share and share alike,

(a) Cash in the sum of twenty seven thousand dollars (\$27,000);

(b) The following:

(1) Promissory note, appraised at four hundred dollars (\$400.00).

(2) Office furniture, appraised at six hundred dollars (\$600.00).

(Plaintiff's Exhibit D)

(3) Automobiles, appraised at two thousand six hundred dollars (\$2,600.00).

(4) Real property in the City and County of San Francisco, described in "Schedule C" attached to this decree;

(13) It is hereby further ordered, adjudged and decreed that all the rest, residue and remainder of the estate of said James L. Flood, deceased, of whatsoever nature and wheresoever situate, and any and all property belonging to said estate not now known or discovered which may belong to said estate or in which said estate may have any interest, and all other property, real, personal and mixed, of which the said James L. Flood died seized or possessed or in which he had any right, title, interest or estate at said time, or in which his estate has since acquired by operation of law, or otherwise, any right, title, interest or estate other than or in addition to that of said deceased at the time of his death. whether said property or said rights, titles, interests or estates be now known or discovered or not known or discovered and whether the same appear or do not appear of record, including any unexpended balance that may remain in the hands of the executor after all necessary or appropriate disbursements shall have been made by said executor out of the sum of \$71,163.58 ordered in the decree of settlement of Second Account and of Third Account and Fourth and Final Account and Supplemental Final Account of executor set apart to said executor as an amount estimated to be necessary to pay and discharge sums due and to become due on accounts and for liabilities enumerated and/or covered in said decree settling said accounts; be and the same are hereby awarded, set over and distributed as follows:

(Plaintiff's Exhibit D)

(a) Unto Maud Lee Flood, an undivided one-third thereof;

(b) Unto Mary Emma Flood Stebbins, an undivided one-third thereof;

(c) Unto James Flood, an undivided one-third thereof;

-15-

[Seal Superior Court, County of San Mateo, California]

(14) It Is Hereby Further Ordered, Adjudged and Decreed that upon said executor (a) filing receipts of the distributees herein showing the receipt by said distributees of the properties hereby distributed to them, and (b) making accounting in respect of the amount ordered in the decree of settlement of Second Account and of Third Account and Fourth and Final Account and supplemental Final Account of executor to be set apart to the executor as hereinabove stated, said executor be forthwith discharged of her trust as such executor.

Done in open Court this 28th day of February, 1934.

Wm. F. James

Judge of the Superior Court.

-16-

[Seal Superior Court, County of San Mateo, California]

I, James L. Flood, hereby make, publish and declare this as and to be my last Will.

FIRST

I hereby revoke all Wills and Codicils to Wills heretofore made by me.

(Plaintiff's Exhibit D)

SECOND

I hereby give and bequeath to The Roman Catholic Archbishop of San Francisco, a corporation sole, the sum of twenty thousand (20,000) dollars, to be divided in amounts to be fixed by it amongst the charitable institutions under its control; to The Protestant Episcopal Bishop of California, a corporation sole, the sum of twenty thousand (20,000) dollars, to be divided in amounts to be fixed by it amongst the charitable institutions under its control; to The St. Vincent's Roman Catholic Orphan Asylum of San Francisco for Boys, a corporation, the sum of twenty-five thousand (25,000) dollars; to San Francisco Protestant Orphanage Society, a corporation, the sum of twenty-five thousand (25,000) dollars; to Roman Catholic Orphan Asylum of San Francisco, a corporation, the sum of twenty-five thousand (25,000) dollars; to Maria Kip Orphanage and Alfred Nuttall Nelson Memorial Home, a corporation, the sum of five thousand (5,000) dollars; to Pacific Hebrew Orphan Asylum and Home Society, a corporation, the sum of five thousand (5,000) dollars.

THIRD

I give and bequeath all shares of the capital stock of Flood Realty Company, a corporation, which I may own at the time of my death, to Maud Lee Flood and James E. Walsh, as trustees,

James L. Flood

(Page One)

[Seal Superior Court, County of San Mateo, California]

upon the trusts and for the uses and purposes hereinafter specified, namely:

(Plaintiff's Exhibit D)

- (a) Said trustees shall collect and receive the income from the trust estate during the life of the last survivor of the following named four persons: My wife, Maud Lee Flood, my sister, Cora Jane Flood, and my children, Mary Emma Flood and James Flood. Said four persons are hereinafter called the "primary beneficiaries".
- (b) A "primary share" of the income from the trust estate at any particular time shall be one of as many equal shares of the income at such time from the entire trust estate as shall represent the number of primary beneficiaries then living, plus one (1), if either (but not both) of my said two children shall at such time have died leaving issue then surviving, and plus two (2), if both of my said children shall at such time have died and each shall have left issue then surviving.
- (c) The trustees shall accumulate one primary share of the income from the trust estate for the benefit of my son James until he shall attain majority, and if and when he shall attain his majority the trustees shall pay over and deliver to my said son and there is hereby given and bequeathed to him if, when, and upon the condition that he attains his majority) all such accumulations. If my said son shall die before attaining his majority all accumulations theretofore made and then held for his benefit shall upon his death go and belong (and the

James L. Flood

(Page Two)

[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

same are hereby given, devised and bequeathed) to his then living children, if he shall leave a child or children him surviving, or if he shall leave no child or children him surviving, then in equal shares to such of the primary beneficiaries as shall then be living, provided, however, that the then living issue of my daughter Mary Emma (if she shall theretofore have died leaving issue then surviving) shall take by right of representation of said Mary Emma the share of such accumulations which said Mary Emma would have taken if living.

- (d) From and after the time that my said son James shall attain his majority the trustees shall pay over and deliver to him one "primary share" of the net income (as and when received) from the trust estate.
- (e) The trustees shall pay over and deliver one "primary share" of the net income (as and when received) from the trust estate to each of the three other primary beneficiaries (namely, my said wife, my said sister, and my said daughter) during their respective lives.
- (f) If my said son shall die before the termination of the trust declared in this paragraph (Third), and shall leave issue him surviving, the issue of my said son shall take (and the trustee shall pay over and deliver to such issue) by right of representation of my said son, one "primary share" of the net income (as and when received) from the trust estate.
- (g) If my said daughter shall die before the termination

James L. Flood

(Page Three)

[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

of the trust declared in this paragraph (Third), and shall leave issue her surviving, the issue of my said daughter shall take (and the trustees shall pay over and deliver to such issue) by right of representation of my said daughter, one "primary share" of the net income (as and when received) from the trust estate.

(h) The trusts created by this paragraph (Third) shall cease and determine upon the death of the last survivor of the above named primary beneficiaries, namely, my wife, my sister, and my two children, and upon the termination of said trust, all property then belonging to the trust estate shall go and belong and is hereby given, devised and bequeathed, and shall by the trustees be paid over and delivered, free and clear of any trust,

- (1) if both of my said children shall have left issue then surviving, then one-half to the then living issue of my said daughter (such issue to take by right of representation of my said daughter) and one-half to the then living issue of my said son (such issue to take by right of representation of my said son; or
- (2) if either my said son or my said daughter (but not both) shall have left issue then surviving, then to such then living issue of my said son or of my said daughter as the case may be (by right of representation of my said son or of my said daughter, as the case may be); or
- (3) if neither my said son nor my said daughter shall have left issue then surviving, then to

(Plaintiff's Exhibit D)

"The Regents of the University of California,"
a corporation, in trust, to apply the same

James L. Flood

(Page Four)

[Seal Superior Court, County of San Mateo, California]

to the uses and purposes of the University of
California.

- (i) I hereby authorize and empower the trustees of the trusts created in this paragraph (Third) to sell any property of the trust estate, real or personal, at either public or private sale, and with or without notice, as such trustees may determine, and without the order of any court, and to execute good and valid transfers, conveyances and assignments thereof; also to invest and reinvest the proceeds of sales of property and to purchase or acquire other property, all property so acquired with the proceeds of property given or bequeathed in trust to be held upon the same uses and trusts as are herein declared with respect to the property originally given and bequeathed in trust; also to borrow or lend such moneys as said trustees may deem best, and upon such securities as they may approve. I direct that no bond or other security be required of the trustees above named, or either of them, for the faithful performance of their duties as such trustees.
- (j) I authorize and empower the trustees of the trusts created in this paragraph (Third) to hold, so long as in their judgment it shall be proper so to do, all or any of the shares of the capital stock of Flood Realty Company herein bequeathed to them in trust,

(Plaintiff's Exhibit D)

and any other shares of the same corporation, or other corporate stocks or securities which they may by purchase or otherwise acquire as part of the trust estate, and

James L. Flood

(Page Five)

[Seal Superior Court, County of San Mateo, California]

direct that such trustees shall not, nor shall either of them, be liable for any loss that may be incurred by reason of any depreciation in the value of any such corporate stocks or other securities while so held by them. The trustees shall have power, in person or by proxy, to represent and vote all shares of corporate stock belonging to the trust estate.

- (k) If for any reason one of the trustees of the trusts created by this paragraph (Third) shall be absent or for any other reason be unable to act as a trustee thereof, the other trustee (or if at any time there shall be only one trustee of such trusts, then such sole trustee) shall have and may exercise all rights, powers and authority which could otherwise be exercised by both trustees of such trusts, including the right, power and authority to represent and vote, or by proxy to authorize the representation and voting of, any shares of stock of any corporation constituting or forming a part of the trust estate.
- (l) If either of the trustees named in this paragraph (Third) shall fail or refuse to qualify or act as a trustee of the trusts created in this paragraph (Third), or if at any time one of the trustees of the trusts created by this paragraph (Third) shall die,

(Plaintiff's Exhibit D)

resign, or for any other reason cease to be or to act as such trustee, the remaining trustee shall have and is hereby given the right and power to fill by appointment the vacancy in the office of such trustee. Such appointment shall be evidenced by a written instrument signed and acknowledged by the trustee making the appointment, and by a

James L. Flood

(Page Six)

[Seal Superior Court, County of San Mateo, California]

written acceptance of such appointment, signed and acknowledged by the person so appointed, which instruments of appointment and acceptance shall be filed in the office of the County Recorder of the County of San Mateo, State of California; and upon the execution and filing of such instruments of appointment and acceptance, the appointee named therein shall, without other instruments of transfer or assignment, become one of the trustees created by this paragraph (Third) and be vested with all rights, estates, interests and powers of a trustee of such trusts, including the power to fill the vacancy in the office of the other trustee, if and when such a vacancy shall occur.

FOURTH

I give and devise to my wife, Maud Lee Flood, an undivided one-third interest in all real property of which I may die seized or possessed, and to my daughter, Mary Emma Flood, an undivided one-third interest in all such real property.

(Plaintiff's Exhibit D)

FIFTH

I give and devise an undivided one-third interest in all real property of which I may die seized or possessed, to Maud Lee Flood and James E. Walsh, as trustees, upon the trusts and for the uses and purposes hereinafter specified, namely:

1.—The trustees shall collect and receive the income from the trust estate, and shall accumulate the net income therefrom for the benefit of my son, James Flood (hereinafter called "James"), during the minority of said James.

2.—If and when said James shall attain his majority,

James L. Flood

(Page Seven)

[Seal Superior Court, County of San Mateo, California]

the trusts created in this paragraph (Fifth) shall cease and determine, and said James shall thereupon have and receive (and there is hereby given, devised and bequeathed to him when and upon condition that he attains his majority), and the trustees shall thereupon delivery and convey to him all of the property of the trust estate, including all accumulations theretofore made or then held for his benefit.

3.—If said James shall die before attaining his majority, the trusts created by this paragraph (Fifth) shall cease and determine upon his death, and all property then held upon the trusts created by this paragraph (Fifth), including all accumulations theretofore made or at the time of the death of said James held for the benefit of said James, shall go and be-

(Plaintiff's Exhibit D)

long, and in such event is hereby given, devised and bequeathed, and shall be by the trustees delivered and conveyed,

- (a) if said James shall have left a child or children him surviving, to such child, or (if he shall have left more than one child him surviving) in equal shares to such children of said James; or
- (b) if he shall have left no child or children him surviving, then to my daughter Mary Emma Flood, if she be then living; or if she be not then living, but shall have left issue then surviving, then in equal shares to her then surviving issue; or if my said daughter Mary Emma Flood shall have theretofore died, leaving no issue then surviving, then to my wife Maud Lee Flood, if she be then living; *of ir* said Maud Lee Flood be not then living, then to my sister

James L. Flood

(Page Eight)

[Seal Superior Court, County of San Mateo, California]

Cora Jane Flood if she be then living; or if my sister Cora Jane Flood be not then living, then to "The Regents of the University of California," a corporation, in trust, to apply such property to the uses and purposes of the University of California.

4.—I authorize and empower the trustees of the trusts declared in this paragraph (Fifth) to sell any property of the trust estate, real or personal, at

(Plaintiff's Exhibit D)

either public or private sale, and with or without notice, as they may determine, and without the order of any court, and to execute good and valid transfers, conveyances and assignments thereof; also to invest and reinvest the proceeds of sales of property, and to purchase or acquire other property, all property so acquired with the proceeds of property given or devised in trust to be held upon the same uses and trusts as are herein declared with respect to the property originally given and devised in trust; also to borrow or lend such sums of money as said trustees may deem best and upon such securities as they may approve. I direct that no bond or other security be required of the trustees above named, or either of them, for the faithful performance of their duties as such trustees. I further authorize and empower the trustees of the trusts created by this paragraph (Fifth) to exchange, upon such terms and for such consideration as they deem proper, all or any property of the trust estate for other property, real or personal, including promissory notes or other evidences of indebtedness, shares of the capital stock of Flood Realty Company, a corporation, or of other corporations, or other securities. All property acquired by or upon any such exchange shall be held upon the uses and trusts

James L. Flood

(Page Nine)

[Seal Superior Court, County of San Mateo, California]

which are herein declared with respect to the property originally given and devised by this paragraph

(Plaintiff's Exhibit D)

(Fifth). I authorize and empower said trustees to hold, as part of the trust estate, so long as in their judgment it shall be proper so to do, all or any shares of stock, promissory notes, or other evidences of indebtedness or other securities which they may, by purchase, exchange or otherwise, acquire as part of the trust estate; and direct that they shall not, nor shall either of them, be held liable for any loss that may be incurred by reason of any depreciation in the value of any such promissory notes, stock or other property while so held by them. The trustees shall have power, in person or by proxy, to represent and vote all shares of stock of any corporation belonging to the trust estate. If for any reason or at any time one of the trustees of the trusts created by this paragraph (Fifth) shall be absent or for any other reason unable to act as a trustee thereof, the other trustee (or if at any time there shall be only one trustee of such trusts, then such sole trustee) may exercise all the rights, power and authority to represent and vote, or by proxy to authorize the representation and voting of, any shares of stock of any corporation constituting or forming a part of the trust estate.

If either of the trustees named in this paragraph (Fifth) shall fail or refuse to qualify or act as the trustee of the trusts created in this paragraph (Fifth), or if at any time one of the trustees of the trusts created by this paragraph (Fifth) shall die, resign, or for any other reason cease to be or to act as such trustee, the remaining trustee shall have, and is hereby given, the right and power to fill by ap-

(Plaintiff's Exhibit D)

pointment the vacancy in the office of such trustee.
Such appoint-

James L. Flood

(Page Ten)

[Seal Superior Court, County of San Mateo, California]

ment shall be evidence by a written instrument, signed and acknowledged by the trustee making the appointment, and by a written acceptance of such appointment, signed and acknowledged by the person so appointed, which instruments of appointment and acceptance shall be filed in the office of the County Recorder of the County of San Mateo, State of California; and upon the execution and filing of such instruments of appointment and acceptance, the appointee named therein shall, without other instrument or transfer or assignment, become one of the trustees created by this paragraph (Fifth), and be vested with all rights, estates, interests and powers of a trustee of such trusts, including the power to fill a vacancy in the office of the other trustee if and when such a vacancy shall occur.

SIXTH

I direct that all estate, legacy, inheritance, succession and similar taxes which may be levied or assessed upon or against my estate, or become payable in respect of, any gift, devise, bequest or other disposition of property herein contained, or in respect of any distributive share or part of my estate, shall be paid out of the rest, residue and remainder of my estate.

(Plaintiff's Exhibit D)

SEVENTH

I give, devise and bequeath the rest, residue and remainder of my estate in equal shares to my wife Maud Lee Flood, my daughter Mary Emma Flood, and my son James Flood.

EIGHTH

I appoint as the executors of this Will my wife, Maud James L. Flood

(Page Eleven)

[Seal Superior Court, County of San Mateo, California]

Lee Flood, and my friend, James E. Walsh, and direct that no bond shall be required of them or either of them for the faithful performance of their duties as such executors. I authorize my said executors to sell any property of my estate, real or personal, at either public or private sale, and with or without notice, as they may determine, and without obtaining the order of any court therefor, and to make good and valid transfers, grants and conveyances thereof.

In Witness Whereof, I have hereunto and at the foot of each of the eleven preceding pages hereof, set my hand, this 16th day of November, 1920.

JAMES L. FLOOD

Witnesses:

Garret W. McEnerney residing at 2070 Jackson Street
San Francisco

Darrell W. Daly residing at 21 Beulah St.
San Francisco

(Page Twelve)

[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

The foregoing instrument was signed and subscribed by James L. Flood, the person named therein, at the City and County of San Francisco, State of California, on the 16th day of November, 1920, in the presence of us, both present at the same time, and was at the time of his so subscribing the same, acknowledged and declared by him to us to be his Last Will and Testament; and thereupon we, at his request and in his presence and in the presence of each other, subscribed our names as witnesses thereto.

Garret W. McEnerney residing at 2070 Jackson St.
San Francisco

Darrell W. Daly residing at 21 Beulah St.
San Francisco

(Endorsed) Filed in the Office of the County Clerk of San Mateo County, Calif. Feb 24 1926 Elizabeth M. Kneese, County Clerk By G. R. Winter Dep. Clerk

(Endorsed) Filed in the Superior Court of the State of California in and for the County of San Mateo Mar 11 1926 Elizabeth M. Kneese, Clerk By E. L. Falvey Deputy Clerk

(Page Thirteen)

[Seal Superior Court, County of San Mateo, California]

SCHEDULE A.

Real property situate in the County of Mendocino, State of California, of which distribution is made by this decree, namely:

All those certain parcels of land situate, lying and being in Mendocino County, State of California, which

(Plaintiff's Exhibit D)

together constitute the tract of land of 23,662.8 acres, more or less, and being the tract of lands situate about 40 miles due north of the town of Ukiah, in said Mendocino County, and which tract forms a part of Townships numbered 20, 21 and 22 North, Range 12 West, and a part of Townships numbered 21 and 22 North, Range 13 West, M. D. B. & M., as follows:

First:

In Township 20 North, Range 12 West, M. D. B. & M.
 All of Section 5 containing.....643.32 acres
 All of Section 6 containing.....628.17 acres
 All of Section 7 containing.....617.60 acres
 West half of Section 8 containing.....320 acres

Second:

In Township 21 North, Range 12 West, M. D. B. & M.
 The Northwest 1/4 of Section 3 contain-
 ing160 acres
 All of Section 4 containing.....640 acres
 All of Section 5 containing.....652.88 acres
 All of Section 6 containing.....640.04 acres
 All of Section 7 containing.....645.92 acres
 All of Section 8 containing.....640 acres
 North half of Northwest 1/4 of Section 9,
 containing 80 acres
 North half of Northeast 1/4 of Section 9,
 containing 80 acres
 Southeast 1/4 of Northeast 1/4 of Section
 9, containing..... 40 acres
 East 1/2 of Southeast 1/4 of Section 9,
 containing 80 acres
 North half of Section 17 containing.....320 acres

(Plaintiff's Exhibit D)

All of Section 18 containing.....645.66 acres

All of Section 19 containing.....644.20 acres

[Seal Superior Court, County of San Mateo, California]

South half of Section 20 containing.....320 acres

All of Section 21 containing.....640 acres

All of Section 29 containing.....640 acres

All of Section 30 containing.....642.48 acres

All of Section 31 containing.....640.84 acres

All of Section 32 containing.....640 acres

West 1/2 of Northwest 1/4 of Section 33,
containing 80 acres

West 1/2 of Southwest 1/4 of Section 33,
containing 80 acres

Third:

In Township 21 North, Range 13 West, M. D. B. & M.

All of Section 1 containing.....640 acres

All of Section 2 containing.....640 acres

Northeast 1/4 of Section 3 containing.....160 acres

East 1/2 of Section 11 containing.....320 acres

All of Section 12 containing.....640 acres

North 1/2 of Section 13 containing.....320 acres

-1-

Fourth:

In Township 22 North, Range 12 West, M. D. B. & M.

All of Section 27 containing.....640 acres

All of Section 28 containing.....640 acres

North 1/2 of Section 31 containing.....320 acres

Southeast 1/2 of Section 31 containing.....161.57 acres

All of Section 32 containing.....640 acres

All of Section 33 containing.....640 acres

All of Section 34 containing.....640 acres

(Plaintiff's Exhibit D)

Fifth:

In Township 22 North, Range 13 West, M. D. B. & M.

All of Section 3 containing.....643.12 acres

South 1/2 of Section 10 containing.....320 acres

All of Section 15 containing.....640 acres

[Seal Superior Court, County of San Mateo, California]

All of Section 22 containing.....640 acres

All of Section 23 containing.....640 acres

All of Section 26 containing.....640 acres

All of Section 27 containing.....640 acres

All of Section 34 containing.....640 acres

All of Section 35 containing.....640 acres

All of Section 36 containing.....640 acres

The foregoing parcels constitute a tract of land
containing 23,662.8 acres, more or less;

Together with the buildings and improvements thereon
and all and singular the tenements, hereditaments and
appurtenances thereunto belonging or in anywise apper-
taining and the reversion and reversions, remainder and
remainders, rents, issues and profits thereof.

[Seal Superior Court, County of San Mateo, California]

-2-

SCHEDULE B

Real property situate in the County of Marin,
State of California, of which distribution is
made by this decree, namely;

All those certain parcels of land situate, lying and
being in Marin County State of California, and particu-
larly described as follows:

(Plaintiff's Exhibit D)

First:

Commencing at a point in the Easterly line of Lincoln Avenue, formerly known as Petaluma Avenue, where the same crosses the depression in the Point San Pedro Ridge known as the Dixon or Allman Puerto Suello, said point being in the Northerly line of the corporate limits of the City of San Rafael, thence Southerly along said Easterly line of said Lincoln Avenue 496.1 feet to the most westerly corner of the lot of land conveyed by William T. Coleman to John Allman by deed dated November 5th, 1873, and recorded in Volume "L" of Deeds, page 408, Marin County Records, thence along the Northwesterly line of the said Allman Lot North $61^{\circ} 15'$ East 627.2 feet to the Northerly corner of said Allman Lot, thence South $28^{\circ} 15'$ East 600.0 feet to the Easterly corner of said Allman Lot, thence continuing South $28^{\circ} 15'$ East 100.0 feet to the East corner of Lot 1, Block K, of Glen Park Addition, Coleman Addition to San Rafael, and thence continuing in the same direction to the center of Mountain View Avenue, sometimes called Glen Park Avenue, thence along the center of Mountain View Avenue, in a Northeasterly direction, and along the center of Glen Park Avenue in a southeasterly direction, as said Avenues are laid down and delineated on Map of Coleman's Addition to San Rafael, filed December 28th, 1888, in Map Book 1, Page 39, Marin County Records, to the intersection of the center line of Glen Park Avenue with the center line of an unnamed street connecting Villa Avenue with Glen Park Avenue opposite to the Southeasterly corner of Block G of said Glen Park Addition,

[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

thence continuing along the center line of Glen Park Avenue, South $46^{\circ} 01'$ East 147.4 feet, South $76^{\circ} 14'$ East 100.0 feet, North $66^{\circ} 48'$ East 100.0 feet, North $52^{\circ} 33'$ East 115.8 feet; North $41^{\circ} 07'$ East 154.8 feet, North $71^{\circ} 07'$ East 97.8 feet; South $5^{\circ} 34'$ East 151.3 feet, South $37^{\circ} 24'$ East 107.0 feet; South $68^{\circ} 27'$ East 176.4 feet, North $79^{\circ} 19'$ East 134.5 feet; South $64^{\circ} 59'$ East 152.1 feet, to intersection with Linden Lane, thence continuing on center line of Glen Park Avenue, North $62^{\circ} 20'$ East 103.9 feet, North $62^{\circ} 20'$ East 300.0 feet; North $48^{\circ} 04'$ East 134.4 feet; North $77^{\circ} 14'$ East 132.3 feet; North $62^{\circ} 31'$ East 157.7 feet; North $41^{\circ} 43'$ East 112.5 feet; North $31^{\circ} 35'$ East 167.0 feet; North $66^{\circ} 25'$ East 161.1 feet; North $81^{\circ} 08'$ East 130.0 feet; North $49^{\circ} 44'$ East 138.5 feet, to the intersection of the center line of Mountain View Avenue, thence along the center line of Mountain View Avenue South $33^{\circ} 24'$ West 140.3 feet and South $27^{\circ} 44'$ West 59.0 feet to a point distant North $62^{\circ} 16'$ West 25.0 feet from the Northwest corner of the Tract of land conveyed by William T. Coleman to Charlotte L. Lichtenberg by Deed dated February 16th, 1874, and recorded in Volume "P" of Deeds at page 364, Marin County Records, thence South $62^{\circ} 16'$ East 25.0 feet to said Northwest corner of the Lichtenberg property, thence along the Northerly line of said Lichtenberg property, South 73° East 448.0 feet; thence along the East line of said property South $18^{\circ} 03'$ West 216.2 feet to the Northwest corner of the lot conveyed by William T.

-1-

Coleman to Harry W. Syz, by Deed dated August 15th, 1887, and recorded in Volume 6 of Deeds at Page 137,

(Plaintiff's Exhibit D)

Marin County Records thence South 74° 30' East along the North line of Syz lot to the West line of lot conveyed by Georgie T. Page to Leavitt Baker by Deed dated December 17th, 1921 and recorded in Volume 237 of [Seal Superior Court, County of San Mateo, California]

Deeds at Page 45, Marin County Records; thence North 15° 26' East to the Northwest corner of said Baker lot, thence along the North line of Baker lot South 75° 33' East 329.09 feet and South 76° 34' East 125.26 feet to Northeast corner of said Baker lot, thence North 9° 25' East 250.26 feet to the Northwest corner of the lot of land conveyed by James L. Flood to L. R. Hardy, by Deed dated March 15th, 1906 and recorded in Volume 98 of Deeds at Page 350, Marin County Records, said point being on the Southerly line of Gold Hill Grade, thence along the Southerly line of Gold Hill Grade, South 48° 19' East 112.4 feet; North 70° 56' East 171.3 feet; South 61° 02' East 51.6 feet; South 64° 16' East 46.3 feet; South 79° 27' East 105.1 feet; North 82° 11' East 92.1 feet; South 19° 01' East 168.1 feet; South 56° 48' East 163.8 feet; North 64° East 95.7 feet; South 53° 05' East 69.1 feet, to the Northwest corner of the lot conveyed by James L. Flood to Anne Sheridan, by Deed dated December 6th, 1904 and recorded in Volume 90 of Deeds at Page 256, Marin County Records; thence continuing along the Southerly line of Gold Hill Grade, North 88° 01' East 68.7 feet, North 52° 44' East 53.7 feet; North 35° 03' East 88.4 feet; South 32° 44' East 46.8 feet; South 42° 49' East 54.9 feet; South 63° 25' East 211.1 feet; North 74° 42' East 57.4 feet, thence leaving the Southerly line of Gold Hill Grade, thence North 33° 29' East 30.34 feet to the center line of Gold

(Plaintiff's Exhibit D)

Hill Grade and the Westerly line of the tract of land conveyed by James L. Flood to the San Rafael Development Company, by Deed dated March 22, 1906, and recorded in Volume 99 of Deeds at page 42, Marin County Records; thence along the boundary line of the lands conveyed to the said San Rafael Development Company, North $12^{\circ} 57'$ West 80.8 feet to an iron bolt about 80.0 feet Westerly from the center of [Seal Superior Court, County of San Mateo, California]

Green Gulch, thence ascending the Westerly side of said Green Gulch North 44° East 652.2 feet to an iron bolt, North $36^{\circ} 10'$ East 176.6 feet to an iron bolt, North $12^{\circ} 19'$ East 185.8 feet to an iron bolt, and North $50^{\circ} 58'$ East 101.3 feet to an iron bolt, thence crossing said Green Gulch and ascending South $88^{\circ} 43'$ East 673.5 feet to an iron bolt in the summit of a ridge, thence descending North $71^{\circ} 42'$ East 385.0 feet to an iron bolt, thence South $63^{\circ} 42'$ East 778.2 feet, thence South $78^{\circ} 05'$ East 360.4 feet to an iron bolt driven in the line fence marking the line between the "Towne Ranch" and the lands of James L. Flood; thence along said line and fence, North 1° West 4185.0 feet to the summit of the Point San Pedro Ridge, being the Southerly line of what is called the Remilliard Ranch, thence Westerly along the Summit of said San Pedro Ridge, which Ridge is the Southerly boundary line of what are commonly known as the Remilliard, Stetson and Wagner Ranches, to the point of beginning. Excepting from the above described tract so much of the so-called "Bacon Tunnel Lot" as the same is described in Liber "11" of Deeds, page 258, after deducting the portion thereof reconveyed to Messrs. Mackay and Flood, as described in

(Plaintiff's Exhibit D)

Liber "18" of Deeds, at page 199 of the Records of said Marin County. Also excepting therefrom the right of way for a pipe line from said Tunnel lot as the same is described in Liber "17" of Deeds, page 326, of said records;

Second:

Commencing at the Northeast corner of Lot 61, as said Lot 61 is laid down and delineated upon that certain map entitled "Map of the Chula Vista Terrace" filed August 1st, 1912, in Map Book "4" Page 27, in Marin

-2-

County Records; thence North 29° 44' West 104.4 feet; North 73° 38' West 103.27 feet to the Northwest corner of Lot 64 of said Chula Vista Terrace, thence North 66° 36' West 99.90 feet to the Northwest corner of Lot [Seal Superior Court, County of San Mateo, California]

66 of said Chula Vista Terrace on the South side of Chula Vista Drive, thence along the said Southerly line of Chula Vista Drive, South 64° 11' West 152.29 feet; South 46° 11' West 425.61 feet; South 83° 39' West 86.90 feet, South 70° 39' West 45.86 feet; South 89° 02' West 40.1 feet; North 83° 42' West 69.15 feet; North 68° 06' West 113.67 feet; South 65° 31' West 51.89 feet; South 29° 18' West 95.34 feet; South 18° 47' East 55.58 feet; South 48° 58' East 112.35 feet; South 13° 37' East 178.88 feet; South 30° 10' East 90.26 feet; South 11° 32' West 73.10 feet; South 10° 15' East 190.77 feet; South 20° 45' East 223.51 feet; South 1° 02' West 99.55 feet; thence leaving the Easterly line of Chula Vista Drive, South 77° 26' West 586.73 feet, to a point in the Westerly boundary of the tract of land described in the

(Plaintiff's Exhibit D)

Deed from James L. Flood and wife to James W. Keyes, dated May 22nd, 1911, and recorded in Volume 136 of Deeds at Page 12, Marin County Records; thence along said Westerly boundary South $20^{\circ} 04'$ East 333.90 feet, South 87° East 217.8 feet to the Northwest corner of the Mountain Park Reservation, North $75^{\circ} 30'$ East 66.0 feet to the most Northerly corner of said Mountain Park Reservation, thence South $35^{\circ} 28'$ East 145.0 feet to the Northwest corner of that certain tract of land conveyed by J. W. Mackay and James L. Flood to Louis B. Parrott by Deed dated July 10th, 1890, and recorded in Volume 12 of Deeds at Page 442, Marin County Records; thence along the Northerly side of said Parrott Tract North $86^{\circ} 02'$ East 971.93 feet to the Westerly line of a forty-foot street, thence along said Westerly line, North $55^{\circ} 33'$ West 68.53 feet, North $3^{\circ} 06'$ West 94.69 feet; North $53^{\circ} 56'$ East 277.92 feet; South $83^{\circ} 40'$ East 99.85 feet to the Westerly line of Prospect Place, thence along the Westerly line of Prospect Place, North $38^{\circ} 57'$ West 254.85 feet, North $50^{\circ} 59'$ West 139.04 feet, North $62^{\circ} 13'$ West 173.25 feet, North $14^{\circ} 44'$ East 92.03 feet; North $5^{\circ} 29'$ West 23.35 feet;

[Seal Superior Court, County of San Mateo, California]

North $42^{\circ} 08'$ West 133.27 feet; North $44^{\circ} 08'$ West 111.73 feet; North $15^{\circ} 03'$ West 57.97 feet; North $64^{\circ} 30'$ East 64.16 feet; North $85^{\circ} 30'$ East 180.81 feet; North $51^{\circ} 38'$ East 67.93 feet; North $31^{\circ} 14'$ East 105.99 feet; North $53^{\circ} 03'$ East 59.34 feet; thence leaving Prospect Place, and running Northerly along a curve to the right, having a radius of 497.68 feet and a Long Chord bearing North $18^{\circ} 52'$ West, a distance of 216.94 feet to the Westerly line of Lincoln Avenue, thence along

(Plaintiff's Exhibit D)

the Westerly line of Lincoln Avenue, North 25° 33' West 60.51 feet, North 10° 54' West 68.30 feet and North 13° 01' West 204.26 feet to place of commencement. Excepting, however from the above described premises all portions of the same heretofore dedicated or conveyed for purposes of public roads or highways. Also excepting Lots number 9, 12, 36, 37, 47, 80, 117, 118, 119, 120, 133, 134, 136, 137, 139, 152, 153, 154, 160, 161, as shown and delineated upon that certain map entitled "Map of Chula Vista Terrace," filed August 1st, 1912, in Map Book "4" page 27, in the office of the County Recorder of the County of Marin, State of California;

Third:

Commencing at a point on the Northerly line of the Toll Road in the City of San Rafael, said point being the Southeast corner of the tract of land conveyed by James L. Flood to the City of San Rafael, by Deed dated December 19th, 1913 and recorded in Volume 155 of Deeds, Page 445, Marin County Records, thence Northerly along the Easterly boundary of said City of San Rafael Tract, 739.84 feet to the South line of the tract of land conveyed by James L. Flood to the City of San Rafael, by deed dated March 3rd, 1920 and recorded in [Seal Superior Court, County of San Mateo, California]

Volume 211 of Deeds at Page 389, Marin County Records; thence Easterly along the Southerly line of said last named tract 1190.0 feet, more or less, to the Westerly boundary line of East San Rafael, as laid down and designated on "Map of East San Rafael, Marin Co." filed on January 21st, 1908 in Map Book 2, Page 109, Marin County Records; thence Southerly along the Westerly

(Plaintiff's Exhibit D)

boundary of said East San Rafael to the Northerly line of the Toll Road; thence Westerly along the Northerly line of said Toll Road, 990.0 feet, more or less, to place of beginning;

Fourth:

Beginning at a point on the South line of the tract of land conveyed by David Porter to William T. Coleman by Deed dated May 27th, 1871 and recorded in Volume "J" of Deeds at Page 99, said point being the Southeast corner of the tract of land conveyed by James L. Flood to W. L. Courtright by Deed dated April 9th, 1910, and recorded in Volume 127 of Deeds at Page 483, Marin County Records, running thence along the East line of said Courtright Tract, North 47° 23' East 184.9 feet; North 30° 11' East 203.3 feet; North 13° 27' East 188.4 feet; North 42° 17' East 160.2 feet; North 80° 45' East 109.5 feet; North 63° 00' East 62.2 feet; North 29° 04' East 111.9 feet; North 59° 26' East 151.6 feet; North 3° 58' East 81.0 feet; North 61° 48' East 177.3 feet; North 31° 53' East 121.9 feet; North 2° 52' East 57.1 feet; North 12° 02' West 48.4 feet; North 36° 52' West 127.5 feet; North 43° 33' East 156.2 feet; North 45° 18' East 199.8 feet; North 4° 31' West 181.1 feet; North 26° 41' West 67.5 feet, to the most easterly corner of Lot 12 of Picnic Valley; thence North 29° 40' West 208.1 feet and North 4° 50' East 398.6 feet to the Southerly line of the San Rafael and San Quentin County Road; thence along said Southerly line, South 62° 11' East 118.86 feet; South 81° 11' East 1408.22 feet, [Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

South 81° 27' East 142.04 feet; South 61° 18' East 297.54 feet; South 88° 14' East 118.98 feet; South 54° 30' East 184.66 feet; South 51° 37' East 42.72 feet; South 14° 57' East 105.8 feet; South 49° 50' East 193.72 feet; South 32° 01' East 84.76 feet; South 16° 43' East 159.76 feet; South 35° 37' East 71.72 feet; North 86° 05' East 227.4 feet; South 59° 21' East 272.57 feet; South 39° 19' East 91.23 feet; South 28° 23' West 182.56 feet to the Northeast corner of Lot 28 of Block 4, as said Lot and Block are laid down on "Map of Lomita Park," filed March 19th, 1892, in Map Book 1, Page 66, Marin County Records; thence leaving said County Road, North 66° 40' West 150.0 feet to the Northwest corner of said Lot 28 of Block 4 of Lomita Park, thence South 23° 20' West 600.0 feet to the Northeast corner of Lot 1 of said Block 4 of Lomita Park, thence North 82° 09' West 291.27 feet to the Northwest corner of Lot 1 of said Block 4, and the line of a 50-foot road, thence along the line of a fifty-foot road: North 48° 35' West 88.62 feet; South 52° 08' West 98.96 feet; South 1° 00' East 96.75 feet; South 20° 17' East 288.08 feet; South 22° 49' West 110.64 feet; South 22° 25' East 93.46 feet; South 9° 57' West 25.51 feet; South 42° 17' West 132.67 feet; South 0° 59' East 75.63 feet; South 18° 28' West 136.96 feet; thence along the Easterly line of the Tiburon Boulevard as conveyed by James L. Flood, et al., to the County of Marin, by Deed dated January 8th, 1897, and recorded in Volume 44 of Deeds at Page 111, Marin County Records; thence along the line of said Tiburon Boulevard: South 61° 17' East 117.03 feet; South 86° 37' East 96.46 feet; South 50° 23' East 1.75 feet; South 1° 01' West 33.3 feet; South 32° 29' West 53.3 feet; South 34° 31' East 88.59 feet;

(Plaintiff's Exhibit D)

South 51° 43' East 356.03 feet; East 151.9 feet; South 57° 21' East 172.35 feet; North 89° 17' East 276.43 feet;

[Seal Superior Court, County of San Mateo, California]

North 63° 46' East 126.49 feet; North 88° 34' East 81.88 feet; South 63° 26' East 115.57 feet; South 46° 26'

-4-

East 60.58 feet; South 22° 12' East 151.01 feet; South 59° 16' East 274.06 feet; South 41° 20' East 37.99 feet; South 20° 20' East 38.81 Feet; South 4° 50' East 40.58 feet; South 10° 20' West 38.91 feet; South 31° 00' West 38.97 feet; South 47° 11' West 92.03 feet; South 58° 03' West 149.81 feet; South 16° 54' West 203.07 feet; North 57° 00' West 179.33 feet; South 52° 54' West 63.82 feet to the South boundary line of the tract of land conveyed by David Porter to William L. Coleman by deed dated May 27th, 1871, and recorded in Volume "J" of Deeds at Page 99, Marin County Records; thence along said South boundary line North 57° 00' West 273.18 feet to Station "C 16" of said boundary line, thence continuing along said boundary line, South 80° 30' West 867.9 feet; South 56° 15' West 478.5 feet; North 79° 45' West 264.0 feet; North 62° 15' West 132.0 feet; North 41° 45' West 343.2 feet; North 53° 45' West 632.28 feet; North 26° 00' West 205.92 feet; North 80° 30' West 316.8 feet; South 86° 00' West 353.10 feet; North 23° 00' West 514.8 feet; North 73° 00' West 306.90 feet; North 51° 45' West 554.4 feet; North 32° 45' West 228.0 feet, to the place of beginning. Excepting therefrom any County Roads which may be included in said description;

(Plaintiff's Exhibit D)

Fifth:

Beginning at an angle point in the North line of the San Rafael and San Quentin County Road at the end of the fourth course of said road, as said road is described in the Deed from John W. Mackay and James L. Flood to the County of Marin, dated January 16th, 1891, and recorded in Volume 16 of Deeds at page 25, Marin County Records, thence along said Northerly line of said road, South $14^{\circ} 57'$ East 106.8 feet, South $49^{\circ} 50'$ East

[Seal Superior Court, County of San Mateo, California]

184.28 feet, South $32^{\circ} 01'$ East 102.24 feet, South $16^{\circ} 43'$ East 153.84 feet, South $35^{\circ} 37'$ East 28.28 feet, North $86^{\circ} 05'$ East 212.6 feet, South $59^{\circ} 21'$ East 301.83 feet to the right of way of the Northwestern Pacific Railroad Company, thence Northwesterly along said right of way 975.0 feet to place of beginning;

Sixth:

Lots 1, 2, 15, 16 and 28, Block 4, and Lots 3, 4, 9, 10, 11, 12, Block 6, as said lots are laid down and designated on "Map of Lomita Park," filed in the Office of the County Recorder of the County of Marin, State of California, on March 19th, 1892, Map Book 1, page 66;

Seventh:

Commencing at a point distant North $29^{\circ} 35'$ East 7.2 feet from the westerly corner of the tract of land conveyed by William T. Coleman to Thomas O'Connor by a Deed dated November 18th, 1886 and recorded in Liber 4 of Deeds at Page 273, Marin County Records, said point being in the middle of a 60 foot road, thence along the middle of said 60-foot road, South $89^{\circ} 17'$

(Plaintiff's Exhibit D)

West 86.9 feet; South 66° 12' West 147.5 feet; North 72° 13' West 327.8 feet; North 22° 26' West 84.6 feet; North 56° 46' West 49.7 feet; North 85° 44' West 249.1 feet; North 60° 54' West 158.5 feet; North 24° 14' West 54.5 feet; North 13° 45' East 124.2 feet; North 17° 53' West 67.7 feet; North 58° 53' West 132.3 feet; North 36° 00' West 263.00 feet; North 11° 25' West 83.4 feet; North 16° 51' East 201.5 feet; North 13° 30' West 128.00 feet; North 7° 10' East 64.6 feet; North 30° 47' East 130.3 feet; North 18° 56' West 70.0 feet; North 58° 31' West 59.8 feet; North 82° 48' West 204.8 feet; South 68° 38' West 203.5 feet; South 71° 43' West 116.6 feet; North 85° 22' West 383.6 feet; North 68° 05' West 91.9 feet; North 53° 44' West 244.3 feet; North 44° 26' West 176.2 feet; North 13° 29' West

[Seal Superior Court, County of San Mateo, California]

404.8 feet; North 49° 52' West 95.3 feet; North 78° 19' West 116.2 feet; South 79° 05' West 162.5 feet; North 70° 53' West 81.7 feet; North 50° 48' West 106.0 feet; North 37° 24' West 186.9 feet; North 71° 51' West 194.6 feet, thence leaving said road, and running along the Southeasterly boundary line of the tract of land conveyed by John W. Mackay and James L. Flood to Rebecka Helene Daly by Deed dated July 10th, 1894, and recorded in Vol. 30 of Deeds at Page 234, Marin County Records, North 36° 49' East 670.9 feet to the center of the right of way of the Northwestern Pacific Railroad, thence along said center line North 50° 34' West 1575.8 feet to the center line of Simms Street, thence along the center line of said Simms Street North 39° 48' East 30.0 feet; North 85° 42' East 86.4 feet, North 72° 02' East 235.8 feet; North 48° 47' East 58.2 feet; North 58°

(Plaintiff's Exhibit D)

01' East 88.1 feet; North 60° 38' East 88.0 feet; North 77° 10' East 83.2 feet; North 88° 40' East 166.0 feet; North 61° 46' East 126.7 feet; North 43° 47' East 254.3 feet to the center line of the Toll Road, thence along the center line of said Toll South 37° 10' East 213.9 feet; South 39° 59' East 5739.5 feet to the center line of the Right of Way of the Northwestern Pacific Railroad, thence along said center line of said Railroad, Northwesterly 580.00 feet more or less to a point in line with the westerly line of the O'Connor Tract, hereinbefore referred to, thence South 29° 35' West along the westerly line of said O'Connor Tract, 322.0 feet to place of beginning;

Excepting therefrom:

- (a) The right of way of the Roads herein mentioned;
- (b) The right of way conveyed to the Bay Counties Railway, by deed dated December 5th, 1907, and recorded in Volume 112 at Page 179, Marin County Records;
- (c) The right of way conveyed to the Pacific Gas and Electric Company by deed dated January 11th, 1913, recorded in Vol. 148 of Deeds at Page 326, Marin County Records;
- (d) The right of way conveyed to the Pacific Telephone & Telegraph Company, by Deed dated May [Seal Superior Court, County of San Mateo, California] 7th, 1912 and recorded in Volume 144 of Deeds at Page 106, Marin County Records;
- (e) The right of way conveyed by William T. Coleman to the Marin County Water Company, by

(Plaintiff's Exhibit D)

Deed dated September 9th, 1874, recorded in Volume "M" of Deeds at Page 77, Marin County Records;

(f) The right of way of the Northwestern Pacific Railroad Company;

Eighth:

Commencing at the most Southerly corner of Lot 11 of Block 26, as said lot and block are laid down and so designated on "Map of East San Rafael," filed on January 21st, 1908 in Map Book 2, Page 109, Marin County Records, said point of commencement being on the Northeasterly line of San Rafael and San Quentin Toll Road, thence along the exterior boundary line of said East San Rafael, North 41° 07' East 201.8 feet; North 24° 01' West 731.0 feet; North 14° 31' West 1239.6 feet; North 9° 30' West 783.5 feet; North 18° 52' West 224.0 feet; North 2° 03' West 675.9 feet; North 8° 05' East 539.0 feet; North 14° 21' East 2795.1 feet; North 14° 21' East 404.1 feet to the South line of the San Rafael Canal, thence along said south line South 44° 00' East to the angle point in the North line of Lot 13-1/2, Section 2, Township 1 North, Range 6 West M.

-6-

D. M., thence continuing along the South line of San Rafael Canal, East 2178 feet and South 62° 30' East 5940.0 feet to the line of Nine feet of water at lowest stage of the tide, thence along said line of Nine feet of water, Southerly to the Northeast corner of Tide Lot 29, Section 12 of Township 1 North, Range 6 West, M. D. M., thence West 41 chains, more or less, to the Northeast corner of Lot 25 in said Section 12; thence

(Plaintiff's Exhibit D)

South to the center line of the Northwestern Pacific Railroad, Right of Way, thence westerly along said center line to the intersection of said center line with the Northeast line of the San Rafael and San Quentin Toll Road, thence Northwesterly along the northeast line of said Toll Road to the point of beginning. Excepting there-

[Seal Superior Court, County of San Mateo, California]

from, Lots 7-1/2, 8-1/2, 10, 11, 17, 18, 24, 27 and 31 of Section One; Lot 16, Section Two; Lots 2 and 17, Section 11, and Lots 2, 3, 4, 5, 6, Section Twelve, Township 1 North, Range 6 West, M. D. M.; also excepting right of way conveyed to the City of San Rafael for outfall sewer, by Deed dated January 27th, 1899, and recorded in Volume 55 of Deeds at Page 1, Marin County Records; and excepting right of way of Northwestern Pacific Railroad;

Together with the buildings and improvements thereon and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

The above described tracts shall not be deemed to include any of the lands or interests in lands conveyed in the following instruments of record in the office of the County Recorder for the County of Marin, State of California, to the grantees named therein, respectively, but all of said lands and interests in lands so conveyed as aforesaid, are excluded and excepted therefrom:

- (a) Deed of Grant executed May 6, 1926, by James E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, de-

(Plaintiff's Exhibit D)

ceased, to the City of San Rafael, a municipal corporation, recorded June 5, 1926, in Liber 96 of Official Records, Marin County, at page 416;

- (b) Deed of Grant executed June 29, 1926, by James E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, deceased, to B. R. Miller, recorded June 30, 1926, in Liber 101 of Official Records, Marin County, at page 193;

-7-

- (c) Deed of Grant executed June 25, 1927, by James E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, deceased, to Edwin H. Grandke, recorded June 28, 1928, in Liber 121 of Official Records Marin County, at page 143;
- (d) Deed of Grant executed June 25, 1927, by James [Seal Superior Court, County of San Mateo, California] E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, deceased, to Marin Municipal Water District, a Public Corporation, recorded July 22, 1927, in Liber 123 of Official Records, at page 242;
- (e) Deed of Grant of Right of Way for highway purposes executed October 15, 1928, by James E. Walsh as the duly appointed, qualified and acting executor of the will of James L. Flood, deceased, to the State of California, recorded October 25th, 1928, in Liber 159 of Official Records, Marin County, page 255;

(Plaintiff's Exhibit D)

- (f) Deed of Grant of Right of Way for highway purposes executed September 19, 1930 by Maud Lee Flood and James E. Walsh as the duly appointed, qualified and acting executors of the will of James L. Flood, deceased, to the State of California, recorded October 17, 1930, in Liber 203 of Official Records, Marin County, at page 289;
- (g) Quitclaim Deed executed February 18, 1931, by Maud Lee Flood and James E. Walsh as the duly appointed, qualified and acting executors of the will of James L. Flood, deceased, to Northwestern Pacific Railroad Company, a corporation, recorded March 12, 1931 in Liber 210 of Official Records, Marin County, at page 255;
- (h) Deed of Grant of Right of Way for transmission and distribution of electricity executed October 23, 1930 by Maud Lee Flood and James E. Walsh as the duly appointed, qualified and acting executors of the will of James L. Flood, deceased, to

-8-

Pacific Gas and Electric Company, a corporation, recorded April 11, 1931 in Liber 228 of Official Records, Marin County, at page 7.

-9-

[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

SCHEDULE C

Real property situate in the City and County of San Francisco, State of California, of which distribution is made by this decree, namely;

All that certain piece or parcel of land situate, lying and being in the City and County of San Francisco, State of California, and bounded and described as follows, to-wit:

Beginning at the Northwest corner of Thirty-first Avenue and Dock Street; thence northwesterly along the Northerly line of Thirty-first Avenue six hundred (600) feet to the easterly line of Ship Street; thence North-easterly along the Easterly line of Ship Street two hundred (200) feet to the Southerly line of Thirtieth Avenue; thence Southeasterly along the Southerly line of Thirtieth Avenue six hundred (600) feet to the Westerly line of Dock Street; and thence Southwesterly at right angles and along the last named line, two hundred (200) feet to the place of beginning. Being twenty-four (24) lots numbered from one (1) to twenty-four (24), inclusive, and comprising all of Block numbered Eight Hundred and Forty (840).

Together with the buildings and improvements thereon and all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining and reversion and reversions, remainder and remainders, rents, issues and profits thereof.

[Seal Superior Court, County of San Mateo, California]

(Plaintiff's Exhibit D)

State of California, County of San Mateo—ss.

I, W. H. Augustus, County Clerk of the County of San Mateo, State of California, and ex-Officio Clerk of the Superior Court thereof, do hereby certify the foregoing attached to be a full, true and correct copy of the original Decree of Final Distribution, Copy of Last Will and Testament and Schedules A, B, and C thereto attached in the within entitled Matter action as the same appears on file and of record in this office.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Superior Court, at my office in the County of San Mateo, this 27th day of June, 1945.

(Seal)

W. H. AUGUSTUS,
Clerk,

By June M. Lynch,
Deputy Clerk.

[Endorsed]: No. 4139-BH. Gavin vs. USA. Plfs. Exhibit D. Filed Jul. 31, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

DELINQUENT TAX

INDIVIDUAL INCOME TAX RETURN

FOR NET INCOMES FROM SALARIES OR WAGES OF MORE THAN \$5,000
AND INCOMES FROM BUSINESS, PROFESSION, RENTS, OR SALE OF PROPERTY

For Calendar Year 1934

or fiscal year began 1934, and ended 1935
File This Return Not Later Than the 15th Day of the Third Month Following the Close of the Taxable Year

PRINT NAME AND ADDRESS PLAINLY BELOW

CONSTANCE MAY GAVIN

(Wife) (Both husband and wife, unless in a joint return)

1844 Buckingham Road

(Street and number, or rural route)

Los Angeles, Los Angeles, California

(Post office)

(County)

(State)

Do Not Write in These Spaces

File No. 1212

Serial Number May 2003

Date Filed May 20 1935

District

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

MAY 20 1935

Explanation of deductions
claimed on Lines 8 and 16

SCHEDULE B—INCOME FROM RENTS AND ROYALTIES (See instruction 7)

Explanation of deductions claimed in Column 8.

SCHEDULE C (CAPITAL GAINS AND LOSSES) (See Instruction E)

[illegible]

SCHEDULE D—INTEREST ON LIBERTY BONDS AND OTHER OBLIGATIONS OR SECURITIES (See Instruction 9)

SCHEDULE E—INCOME FROM DIVIDENDS

Itemize all dividends received during the year, stating amounts and names and addresses of corporations declaring the dividends:

Chandler Pacific Life Co.

SCHEDULE 7—EXPLANATION OF DEDUCTIONS CLAIMED IN ITEMS 1, 14, 16, 17, AND 18

Item 17 - \$59 contributed to St. Pauls Parish Church and \$16.00 paid to Community Chest out of total of \$75.00 is deductible
by me. Total deductible \$75.00

EXPLANATION OF DEDUCTION FOR DEPRECIATION CLAIMED IN SCHEDULES A AND B

EXPLANATION OF DEDUCTION FOR LOSSES BY FIRE, STORM, ETC., CLAIMED IN SCHEDULE A AND IN ITEM 10

1. Name of Property	2. Date Acquired	3. Cost	4. Depreciable Improvements	5. Depreciation Allowable Basis Adjustment	6. Depreciation and Salvage Value	7. Disposition
		\$	\$	\$	\$	\$

(Plaintiff's Exhibit E)

* * * * *

[Endorsed]: No. 4139-BH-Civ. Gavin vs. USA.
Plfs. Exhibit E. Filed Jul. 31, 1945. Edmund L. Smith,
Clerk, by MEW, Deputy Clerk.

[Endorsed]: No. 11251. United States Circuit Court
of Appeals for the Ninth Circuit. United States of
America, Appellant, vs. Constance May Gavin, Appellee.
Transcript of Record. Upon Appeal From the District
Court of the United States for the Southern District of
California, Central Division.

Filed February 12, 1946.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for
the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11251

UNITED STATES OF AMERICA,

Appellant,

v.

CONSTANCE MAY GAVIN,

Appellee.

APPELLANT'S STATEMENT OF POINTS TO BE
RELIED UPON ON APPEAL

To Constance May Gavin and Leslie J. Heap, her attorney:

You, and Each of You, will please take notice under the provisions of Rule 75 of the Rules of Civil Procedure for the United States District Court, that the appellant intends to rely upon the following points in the appeal of the above-entitled case.

I.

The Court erred in drawing its Conclusion of Law Numbered I for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

II.

The Court erred in drawing its Conclusion of Law Numbered I by failing therein to conclude that the value of the property received by the plaintiff in the compromise settlement of her litigation for a share of the

Estate of James L. Flood, Deceased, constituted taxable income to her, for the taxable year 1934.

III.

The Court erred in drawing its Conclusion of Law Numbered II for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

IV.

The Court erred in drawing its Conclusion of Law Numbered II by failing therein to conclude that said tax of \$22,373.66 and interest thereon in the sum of \$4,997.88 paid by plaintiff to the defendant during the year 1938 was legally, correctly and properly assessed and collected.

V.

The Court erred in drawing its Conclusion of Law Numbered III for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

VI.

The Court erred in drawing its Conclusion of Law Numbered III by failing therein to conclude and hold that the plaintiff had not overpaid her income taxes for the year 1934 and that nothing was due or owing the plaintiff from the defendant.

VII.

The Court erred in drawing its Conclusion of Law Numbered IV for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

VIII.

The Court erred in drawing its Conclusion of Law Numbered IV by failing therein to conclude and hold that the plaintiff was entitled to recover nothing from the defendant.

IX.

The Court erred in drawing its Conclusion of Law Numbered V for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

X.

The Court erred in drawing its Conclusion of Law Numbered V by failing therein to conclude and hold that the defendant was entitled to have and recover its costs from the plaintiff.

XI.

The Court erred in drawing its Conclusion of Law Numbered VI for the reason that said Conclusion of Law is not supported by and is contrary to the evidence before the Court and the facts found by the Court.

XII.

The Court erred in drawing its Conclusion of Law Numbered VI by failing therein to conclude and hold that plaintiff should recover nothing by her action, but that the defendant should recover judgment from the plaintiff for its costs.

XIII.

The Court erred in giving and entering judgment for the plaintiff in that the record, pleadings, evidence and

the facts found by the Court required that judgment be rendered in favor of the defendant herein for its costs.

Dated: this 21 day of January, 1946.

CHARLES H. CARR—E.H.

United States Attorney

E. H. MITCHELL—E.H.

Asst. U. S. Attorney

GEORGE M. BRYANT—E.H.

Asst. U. S. Attorney

EUGENE HARPOLE

Special Attorney

Bureau of Internal Revenue

Attorneys for Appellant.

Received a copy of the above Appellant's Statement of Points on January 23, 1946. Leslie L. Heap, Attorneys for Appellee.

[Endorsed]: Filed Feb. 14, 1946. Paul P. O'Brien, Clerk.

